138-380

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 152.

WILLIAM D. WADSWORTH, AS ADMINISTRATOR OF THE ESTATE OF FRANK L. WADSWORTH, DECEASED, PLAINTIFF IN ERROR,

vs.

THEODORE ADAMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

FILED OCTOBER 7, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 19, 1890.

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1 *Summons.*

Original.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Northern District of Alabama.

The President of the United States to the marshal of said district, Greeting:

You are hereby commanded to summons Frank L. Wadsworth, who is a citizen of the State of Alabama, to appear before the hon. circuit court aforesaid, at the place of holding said court, at Huntsville, on the 1st Monday of April next, to answer the complaint of Theodore Adams, who is a citizen of the State of Pennsylvania; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 29th day of October, in the year of our Lord one thousand eight hundred and eighty-three.

Issued this 29 day of October, in the year of our Lord one thousand eight hundred and eighty-three.

A. W. McCULLOUGH,
Clerk U. S. Circuit Court, Northern District of Alabama.

2 *Complaint.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Northern District of Alabama. Term, 1883.

THEODORE ADAMS, Plaintiff,
vs.
FRANK L. WADSWORTH, Defendant.

Theodore Adams, who is a citizen of the State of Pennsylvania, claims of Frank L. Wadsworth, who is a citizen of the State of Alabama, the sum of ten thousand dollars as damages for the breach of an agreement made and entered into between the plaintiff, said Theodore Adams, and the defendant, said Frank L. Wadsworth, on, to wit, the 15th day of March, 1883, in substance as follows, to wit: The plaintiff, at the instance and request of the defendant, promised the defendant that he, the plaintiff, would endeavor and undertake to find a purchaser of five promissory notes, of the face value of one hundred thousand dollars each, held and owned by the defendant and made by the Pratt Coal and Coke Company, a corporation, payable — the defendant or bearer. Said purchaser, to be found by plaintiff as aforesaid, was to take said notes at a discount of eight per centum and was to pay the

defendant therefor in cash, and the defendant promised to
3 pay the plaintiff the sum of ten thousand dollars to have said notes discounted as aforesaid, and the plaintiff was empowered by the defendant to negotiate a sale of said notes at a discount of eight per centum as aforesaid, and as compensation for making such sale the defendant promised as aforesaid to pay the plaintiff the said sum of ten thousand dollars; and the plaintiff alleges that he has performed the said agreement undertaken by him as aforesaid, in this: that on, to wit, the 28th day of March, 1883, the plaintiff, for and on behalf of the defendant, contracted with J. J. McCombs, of New York, for the sale of the said notes to the said McCombs at a discount of eight per centum, and the said McCombs agreed to take said notes at said price in cash, and the plaintiff, for and on behalf of the defendant, agreed to sell to the said McCombs the said notes at the discount aforesaid, and, notwithstanding the said agreement between the plaintiff for defendant and the said McCombs, the defendant refused to sell said notes to the said McCombs on, to wit, the 29th day of March, 1883, although the said McCombs, on the said 29 day of March, 1883, offered to pay the defendant the price agreed upon for said notes between plaintiff and said McCombs as aforesaid, and defendant still refuses and neglects to sell
4 said notes to said McCombs under the agreement between plaintiff and McCombs aforesaid, and the defendant neglects and refuses to pay the plaintiff the sum of ten thousand dollars for negotiating the said sale to the said McCombs, though often requested so to do by the plaintiff; wherefore the plaintiff brings this his suit to recover of the defendant the said sum of ten thousand dollars, together with the interest thereon.

SMITH AND BRADFORD,
Att'ys for the Plaintiff.

Marshal's Return.

Wadsworth in San Antonio, Texas, and has been for several months. Returned without service April 4th, 1884.

J. M. HINDS, *U. S. Marshal.*
L. G. PETTYJOHN, *Deputy.*

Endorsed: Summons and complaint. Theodore Adams *vs.* Frank L. Wadsworth. Circuit court of the United States, northern district of Alabama. Filed in clerk's office October 29, 1883. A. W. McCullough, clerk. Returned & filed April 5th, 1884. A. W. McCullough, clerk.

5 THE UNITED STATES OF AMERICA, }
Northern District of Alabama, Southern Division. }

Be it remembered that heretofore, to wit, on the 7th day of April, A. D. 1884, it being a day of the regular term of the circuit court of the United States for the northern district of Alabama, begun and held at the United States court-rooms, in the city of Huntsville, in said division of said district, on the 1st Monday of April, A. D.

1884, and of the Independence of the United States of America the one hundred and 8th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

THEODORE ADAMS
vs.
FRANK L. WADSWORTH. } 1291. S., &c.

Comes the plaintiff, by attorneys, and on his motion, and it appearing to the satisfaction of the court that the summons that issued in this cause has been returned by the marshal not executed, it is ordered by the court that an *alias* summons and complaint be issued to the defendant.

I hereby certify that the above is a true and correct copy of the original order of record in my office.

Witness my hand and seal of said circuit court, at Birmingham, in said division of said district, this the 7 day of April, 1887.

A. W. McCULLOUGH, *Clerk.*

[Endorsed:] No. —. —— —— *vs.* —— ——. Duly certified transcript of —. —— ——, clerk U. S. circuit court.

6 *Alias Summons & Complaint.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Northern District of of Alabama. Term, 1883.

THEODORE ADAMS, Plaintiff,
vs.
FRANK L. WADSWORTH, Defendant.

Theodore Adams, who is a citizen of the State of Pennsylvania, claims of Frank L. Wadsworth, who is a citizen of the State of Alabama, the sum of ten thousand dollars as damages for the breach of an agreement made and entered into between the plaintiff, said Theodore Adams, and the defendant, said Frank L. Wadsworth, on, to wit, the 15th day of March, 1883, in substance as follows, to wit: The plaintiff, at the instance and request of the defendant, promised the defendant that he, the plaintiff, would endeavor and undertake to find a purchaser of five promissory notes of the face value of one hundred thousand dollars each, held and owned by the defendant and made by the Pratt Coal and Coke Company, a corporation, payable to the defendant or bearer. Said purchaser, to be found by plaintiff as aforesaid, was to take said notes at a discount of eight per centum and was to pay the defendant therefor
7 in cash, and the defendant promised to pay the plaintiff the sum of ten thousand dollars to have said notes discounted as aforesaid, and the plaintiff was empowered by the defendant to

negotiate a sale of said notes at a discount of eight per centum as aforesaid, and as compensation for making such sale the defendant promised as aforesaid to pay the plaintiff the said sum of ten thousand dollars; and the plaintiff alleges that he has performed the said agreement undertaken by him as aforesaid, in this that: on, to wit, the 28 day of March, 1883, the plaintiff, for and on behalf of the defendant, contracted with J. J. McCombs, of New York, for the sale of the said notes to the said McCombs at a discount of eight per centum, and the said McCombs agreed to take said notes at said price in cash, and the plaintiff, for and on behalf of the defendant, agreed to sell to the said McCombs the said notes at the discount aforesaid, and notwithstanding the said agreement between the plaintiff, for defendant, and the said McCombs, that defendant refused to sell said notes to the said McCombs on, to wit, the 29th day of March, 1883, although the said McCombs, on the said 29 day of March, 1883, offered to pay the defendant the price agreed upon for said notes between plaintiff and said McCombs as
8 aforesaid, and the defendant still refuses and neglects to sell said notes to said McCombs under the agreement between plaintiff and McCombs aforesaid, and the defendant neglects and refuses to pay the plaintiff the sum of ten thousand dollars for negotiating the said sale to the said McCombs, though often requested so to do by the plaintiff; wherefore the plaintiff brings this his suit to recover of the defendant the said sum of ten thousand dollars, together with the interest thereon.

SMITH AND BRADFORD,
Att'ys for the Plaintiff.

Endorsed: No. 1291. Summons and complaint. Theodore Adams *vs.* Frank L. Wadsworth. Circuit court of the United States, northern district of Alabama. Filed in clerk's office October 29th, 1883. A. W. McCullough, clerk. A true copy. Test.

9 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Northern District of Alabama.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby commanded to summon Frank L. Wadsworth, who is a citizen of the State of Alabama, to appear before the hon. circuit court aforesaid, at the place of holding said court, at Huntsville, on the second Monday of October next, to answer the complaint of Theodore Adams, who is a citizen of the State of Pennsylvania; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first Monday of April, in the year of our Lord one thousand eight hundred and eighty-four.

Issued the 12th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Attest: A. W. McCULLOUGH,
Clerk U. S. Circuit Court, Northern District of Ala.

A true copy.
Test: A. W. McCULLOUGH, *Clerk.*

10 [Endorsed:] No. 1291 & 28. Circuit court of the United States, northern district of Alabama, southern division. *Alias* summons and complaint. Theodore Adams *vs.* Frank L. Wadsworth. Issued this 12 day of May, 1884. A. W. McCullough, clerk. Returned and filed this 16 day of May, 1884. A. W. McCullough, clerk. Smith & Bradford, plaintiff's attorneys. Received in office this 12 day of May, 1884. J. M. Hinds, U. S. marshal. Executed by serving a copy of the within summons and complaint on defendant, Frank L. Wadsworth, in his office in Birmingham, Ala., this the 15 day of May, 1884. Jos. M. Hinds, U. S. marshal, by L. G. Pettyjohn, deputy.

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11 THE UNITED STATES OF AMERICA, }
Northern District of Alabama. }

Be it remembered that heretofore, to wit, on the 27 day of October, A. D. 1884, it being a day of the regular term of the circuit court of the United States for the —— of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Huntsville, in said division of said district, on the 2nd Monday of October, A. D. 1884, and of the Independence of the United States of America the one hundred and 9th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

THEODORE ADAMS }
vs. } 1291, 28.
FRANK L. WADSWORTH. }

This day comes Wm. H. Smith, Esq., attorney for the plaintiff, and suggests the death of the defendant, Frank L. Wadsworth; and, it being made to appear to the satisfaction of the court that said defendant is dead, it is ordered by the court that this suit abate as to him.

And, on further motion of plaintiff's attorney, it is made to appear to the satisfaction of the court that William D. Wadsworth has been duly appointed by the probate court of Jefferson county, Alabama, the administrator of the estate of said Frank L. Wadsworth,

deceased, it is ordered by the court that this suit be revived against said William D. Wadsworth, administrator as aforesaid.

I hereby certify that the above is a true and correct copy of the original order of record in my office.

Witness my hand and seal of said circuit court, at Birmingham, in said division of said district, this the 27 day of October, 1887.

A. W. McCULLOUGH, *Clerk.*

[Endorsed:] No. —. —— —— *vs.* —— ——. Duly certified transcript of— . —— ——, clerk U. S. circuit court.

12 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Northern District of Alabama.

The President of the United States to the marshal for said district, Greeting:

Whereas, at the October term, 1884, of the circuit court of the United States for the northern district of Alabama, in a cause pending therein in the name of Theodore Adams, plaintiff, against Frank L. Wadsworth, defendant, the death of the defendant, Frank L. Wadsworth, was suggested to the court and the appointment of William D. Wadsworth as administrator of the estate of said decedent was proven and *scire facias* awarded to bring in the said William D. Wadsworth, administrator as aforesaid:

Now, therefore, you are hereby commanded to summon the said William D. Wadsworth, as administrator of the estate of Frank L. Wadsworth, deceased, to appear at the next term of the circuit court, to be held for said district on the first Monday in April next, at the place of holding the same, in the city of Huntsville, then and there to show cause, if any he has, why the said suit should not be revived and progress against him as the representative of the said Frank L. Wadsworth, the deceased.

13 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second Monday of October, in the year of our Lord one thousand eight hundred and eighty-four.

Issued this 21st day of February, in the year of our Lord one thousand eight hundred and eighty-five.

A. W. McCULLOUGH,
Clerk U. S. Circuit Court, Nor. Dist-ict of Alabama.

Marshal's Return.

Executed by placing a copy of the within in hands of Wm. D. Wadsworth March 14th, 1885, in the city of Montgomery, Alabama.

J. M. HINDS, *U. S. Marshal.*
L. G. PETTYJOHN, *Deputy.*

Endorsed: "Returned" & filed this 17th day of March, A. D. 1885. A. W. McCullough, clerk. A true copy. Test: A. W. McCullough, clerk.

14 In the Circuit Court of United States, at Huntsville, Alabama.

THEODORE ADAMS
v.
F. L. WADSWORTH.

In this case it is agreed that the above cause may be renewed against W. D. Wadsworth, as the administrator of the estate of F. L. Wadsworth, deceased, and that the cause be transferred for trial to the docket of the circuit court of the United States for the southern division of the northern district of Alabama, to be held at Birmingham, Alabama, April 22, 1885. If this cause is one that cannot be revived against the administrator of the defendant — is not to be prejudiced by this agreement that it shall be revived April 22, 1885.

SMITH & LOWE, *Att'ys for Pl'ff.*
HEWETT, WALKER AND PORTER,
Att'ys for Def't, W. D. Wadsworth.

Endorsed: Filed in open court this 30th day of April, A. D. 1885. A. W. McCullough, clerk. A true copy. Test: A. W. McCullough, clerk.

15 THE UNITED STATES OF AMERICA,
Northern District of Alabama.

Be it remembered that heretofore, to wit, on the 30 day of April, A. D. 1885, it being a day of the regular term of the circuit court of the United States for the —— of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Huntsville, in said division of said district, on the 1st Monday of April, A. D. 1885, and of the Independence of the United States of America the one hundred and — year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

THEODORE ADAMS
vs.
WILLIAM D. WADSWORTH, Administrator of Frank L. Wadsworth. } 1291.

Comes the plaintiff, by his attorneys, and the death of Frank L. Wadsworth, the defendant in the cause, having been suggested, and counsel for the plaintiff and counsel for William D. Wadsworth, administrator of F. L. Wadsworth, deceased, having filed their written agreement that said cause be and the same should stand revived as against said William D. Wadsworth, as such administrator, it is by the court ordered that this cause be revived against said William

D. Wadsworth, as administrator of Frank L. Wadsworth, deceased. It is further ordered that this cause be transferred to and placed on the docket of the circuit court of the United States for the southern division of the northern district of Alabama, at Birmingham, Alabama. It is further ordered that said written agreement of counsel be filed and made part of the record in this cause.

I hereby certify that the above is a true and correct copy of the original order of record in my office.

Witness my hand and seal of said circuit court, at Birmingham, in said division of said district, this the 30th day of April, 1887.

A. W. McCULLOUGH, *Clerk.*

[Endorsed:] No. —. —— —— *vs.* —— ——. Duly certified transcript of —. —— ——, clerk U. S. circuit court.

16 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 14th day of September, A. D. 1885, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the 1st Monday of September, A. D. 1885, and of the Independence of the United States of America the one hundred and 10th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

THEODORE ADAMS
vs.
WILLIAM D. WADSWORTH, Administrator of Frank L. Wadsworth. } 28.

Comes the parties, by their attorneys, and, on motion and for good cause shown, it is ordered by the court that this cause be continued.

I hereby certify that the above is a true and correct copy of the original order of record in my office.

Witness my hand and seal of said circuit court, at Birmingham, in said division of said district, this the 14th day of Sept., 1887.

A. W. McCULLOUGH, *Clerk.*

[Endorsed:] No. —. —— —— *vs.* —— ——. Duly certified transcript of —. —— ——, clerk U. S. circuit court.

17 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 17th day of March, A. D. 1886, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district

of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the 1st Monday of March, A. D. 1886, and of the Independence of the United States of America the one hundred and 10th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

THEODORE ADAMS
vs.
WM. D. WADSWORTH, Administrator of Frank L. Wadsworth. } 28.

Comes the parties, by their attorneys, and, on motion and for good cause shown it is ordered by the court that this cause be continued.

I hereby certify that the above is a true and correct copy of the original order of record in my office.

Witness my hand and seal of said circuit court, at Birmingham, in said division of said district, this the 17 day of March, 1887.

A. W. McCULLOUGH, *Clerk.*

[Endorsed:] No. —. —— —— *vs.* —— ——. Duly certified transcript of —. —— ——, clerk U. S. circuit court.

18 *Deft's Plea.*

THEODORE ADAMS, Plaintiff,
vs.
WM. D. WADSWORTH, as Administrator of the Estate of Frank Wadsworth, Deft. } 28.

1. And the said defendant, as administrator of the estate of the said Frank Wadsworth, deceased, for answer to said complaint says that said Frank Wadsworth, deft's intestate, did not undertake or promise in manner and form as the said plaintiff hath above complained during his lifetime, and as this the said defendant puts himself upon his country.

2. For a further and second answer and plea to said complaint, the said defendant says that the whole of the duties of the plaintiff as agent in respect to said notes was not faithfully performed by him; but, on the contrary, the plaintiff, as agent as aforesaid, was guilty of gross misconduct as well as of fraudulent concealment in withholding and concealing from his principal the facts, which existed and *was* known to plaintiff as such agent, that the said J. J. McCombs, to whom the plaintiff as such agent had offered to sell said notes at eight per cent. discount from their face, was ready and willing to buy said notes at eight per cent. discount from their face; and the
19 plaintiff, with knowledge of the facts above stated, acted upon the suggestion of said McCombs and telegraphed to the principal of an offer of a lump sum of three hundred and fifty thousand dollars for the said five notes of one hundred thousand dollars each, with the intention thereby to induce said principal to authorize a sale

of said notes at said sum of three hundred and fifty thousand dollars, when at the very time the plaintiff knew that said McCombs was ready and willing to buy the said notes at eight per cent. discount from their face; and plaintiff avers that by the wrongful and fraudlent effort of the plaintiff above stated to induce and cause a sale of said notes at three hundred and fifty thousand dollars the plaintiff grossly violated his duties as agent and lost the sale of said notes.

3. For a further and third plea and answer to said complaint the defendant denies each allegation or statement contained in said complaint.

Endorsed: Filed in open court Sept. 29, 1886. A. W. McCullough, clerk. A true copy. Test: A. W. McCullough, clerk.

20 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 29 day of September, A. D. 1886, it being a day of the regular term of the circuit court of the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the first Monday of September, A. D. 1886, and of the Independence of the United States of America the one hundred and —, 110 year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

THEODORE ADAMS
vs.
WILLIAM D. WADSWORTH, Administrator of Frank L. Wadsworth.

Come the parties, by their attorneys, and the defendant now interposes his demurrer to defendant's plea numbered two; whereupon, after due consideration, it is by the court ordered that said demurrer be, and the same is hereby, overruled.

I hereby certify that the above is a true and correct copy of the original order of record in my office.

Witness my hand and seal of said circuit court, at Birmingham, in said division of said district, this the 29 day of Sept., 1886.

A. W. McCULLOUGH, *Clerk.*

[Indorsed:] No. —. —— —— *vs.* —— ——. Duly certified transcript of —. —— ——, clerk U. S. circuit court.

21 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

Be it remembered that heretofore, to wit, on the 1st day of October, A. D. 1886, it being a day of the regular term of the circuit court of

the United States for the southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said division of said district, on the first Monday of September, A. D. 1886, and of the Independence of the United States of America the one hundred and 11th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

THEODORE ADAMS
vs.
WILLIAM D. WADSWORTH, as Administrator of Frank L. Wadsworth. } 28.

Comes the plaintiff, by his attorneys, and also comes the defendant, who is sued as the administrator of the estate of Frank L. Wadsworth, deceased, and, issue being joined upon each of the four pleas of defendant, thereupon comes a jury of good and lawful men, to wit, J. M. Phillips and eleven others, who, being duly empaneled and sworn according to law, upon their oaths do say: We, the jury, find for the plaintiff, and assess his damages at twelve thousand eight hundred dollars. It is therefore considered by the court that the plaintiff have and recover of the defendant, William D. Wadsworth, as the administrator of the estate of Frank L. Wadsworth, deceased, the sum of twelve thousand eight hundred dollars, together with the costs in this behalf expended; and it is further considered that an execution issue against said William D. Wadsworth as such administrator, to be levied on the lands and tenements, goods and chattels, and choses in action of the said estate of Frank L. Wadsworth, dece-sed, for the satisfaction of this judgment.

I hereby certify that the above is a true and correct copy of the original order of record in my office.

Witness my hand and seal of said circuit court, at Birmingham, in said division of said district, this the 1st day of October, 1887.

A. W. McCULLOUGH, *Clerk*.

[Indorsed:] No. —. —— —— *vs.* —— ——. Duly certified transcript of —. —— ——, clerk U. S. circuit court.

22 THEODORE ADAMS
vs.
WILLIAM D. WADSWORTH, as Administrator of Frank L. Wadsworth, Deceased.

Be it remembered that on the trial of the above-stated cause in the circuit court of the United States, held at Birmingham, in the southern division of the northern district of Alabama, the following proceedings were had, viz:

The plaintiff, as a witness for himself, testified in substance as follows:

That at and before the commencement of this suit he was a citizen of the State of Pennsylvania, residing in the city of Philadelphia, in said State, and that he has ever since resided and still resides therein, and that he has ever since been and is now a citizen of the said State of Pennsylvania; that some time in March, 1883, he, together with Senators Morrell, Plumb, and others of the North, while traveling South on a pleasure trip, stopped over at Birmingham, Alabama, and that while in Birmingham he became acquainted with H. F. De Bardeleben, and that witness, said De Bardeleben, Morrell, Plumb, and others together visited the several manufacturing establishments in and about Birmingham, and, among them, they visited and examined the property of the Pratt Coal and
23 Coke Company.

Plaintiff was then asked whether while in Birmingham he made any agreement with H. F. De Bardeleben, as the agent of Frank L. Wadsworth, in relation to a sale of any notes of the Pratt Coal and Coke Company.

To this question the defendant objected on the ground that it had not been shown that said H. F. De Bardeleben was at the time the agent of said Frank L. Wadsworth. The plaintiff's attorneys then stated to the court that they would prove by a witness other than Mr. Adams, the plaintiff, that the said De Bardeleben was at the time the agent of said Frank L. Wadsworth in making said agreement. The court then overruled the defendant's objection, and stated that the testimony called for by the question would be excluded unless it was subsequently shown that H. F. De Bardeleben was at the time the agent of said Frank L. Wadsworth. To this ruling of the court the defendant excepted.

The plaintiff then, in answer to said question, stated that while in Birmingham, Alabama, in March, 1883, H. F. De Bardeleben told him that he had five notes of the Pratt Coal and Coke Company for one hundred thousand dollars each, secured by a mortgage on the property of the company and payable, without interest, in one, two, three, four, and five years from their date,
24 and that he wanted to dispose of them at a discount of eight per cent. per annum, and asked Adams if he would undertake to find a purchaser for him at that price. Adams replied that he would undertake to find a purchaser at that price, and that he thought Mr. J. J. McComb, of New York, would take the notes at Mr. De Bardeleben's figures, but that if he, Adams, should undertake to find such purchaser he would charge a commission of ten thousand dollars. De Bardeleben replied that he would pay ten thousand dollars for a sale on those terms. De Bardeleben then explained to the plaintiff that some years previous he was in failing health, and that he had conveyed all of his property to Frank L. Wadsworth, in trust, for his (De Bardeleben's) wife and children, with full authority to said Wadsworth to manage and control said estate, and that the notes of the Pratt Coal and Coke Company for five hundred thousand dollars, which he proposed to have discounted, were payable to said Frank L. Wadsworth, as trustee, for his (De Bardeleben's) wife and children, and the mortgage to secure the same was

executed to said Frank L. Wadsworth, as trustee, for his, De Bardeleben's, wife and children, and that the agreement between said De Bardeleben and said Adams would have to be carried out by
25 said Wadsworth, as trustee, for the wife and children of *and* De Bardeleben. Adams replied that that being so he would have to get the opinion of Gov. W. H. Smith that said Wadsworth, as such trustee, had authority to make a valid transfer of the notes.

To this testimony, in so far as it relates to the statements of De Bardeleben, the defendant objected on the ground that Frank L. Wadsworth being dead and his estate being int-re-ted in the result of the suit, the plaintiff was incompetent to testify to any transaction with or statements by the said F. L. Wadsworth. The court overruled the objection and the defendant excepted.

Plaintiff further testified that he knew F. L. Wadsworth, but that he never had any conversation with him or made any agreement with him, except through said De Bardeleben, in relation to said notes.

The attorneys for plaintiff then asked him whether De Bardeleben, after making agreement mentioned, had said anything in relation to sending the notes to him at Philadelphia. Witness answered that while standing at the Relay House, in Birmingham, De Bardeleben said he would forward the notes to him at Philadelphia.

26 The defendant objected to this testimony on the ground that the plaintiff had testified to a statement by F. L. Wadsworth.

Here some controversy arose as to what the witness had said, and defendant's attorneys asked him if he had not stated that Wadsworth promised to send the notes to him at Philadelphia, and the witness replied that he had not; that he had stated that De Bardeleben had promised to send them, but that in point of fact Wadsworth was standing near by when De Bardeleben made the promise.

Here defendant objected to this statement by De Bardeleben on the ground that plaintiff was incompetent to prove a statement by or transaction with Wadsworth, who was dead, and whose estate was interested in the result of the suit. The court over-uled this objection of defendant, and the defendant excepted to the overruling of the same.

The plaintiff further testified that said De Bardeleben at *a* different times told him that he was very much in need of money to carry out a scheme in which he expected to make a large amount of money, and *pur*suaded him to relinquish his pleasure trip further South and go at once to New York to see if he could find a purchaser for the notes mentioned at a discount of eight per cent. per annum.

26½ Plaintiff arrived in New York on the 27th of March, 1883, and on that day called on J. J. McComb and offered to sell him the said notes at a discount of eight per cent. per annum. McComb did not say whether he would take them or not, but put his clerk to making some calculations in relation to them, and himself left his office and went out to see if he could make arrangements to

get the money in the event he should buy. On his return to his office McComb said he would give three hundred and fifty thousand dollars for the notes, and requested plaintiff to telegraph that offer to H. F. De Bardeleben. Plaintiff told McComb that there was no use in sending the telegram, because De Bardeleben would not accept the offer. McComb insisted on sending said proposition, and plaintiff testified that he felt compelled to notify De Bardeleben of the proposition made by McComb and sent the following dispatch:

NEW YORK, *March* 27, 1883.

H. F. De Bardeleben:

I can sell the five notes, with mortgage, for three hundred and fifty thousand dollars cash, the right of trustee to sell and transfer being all right. Answer.

T. ADAMS.

Plaintiff further testified that he had sent said dispatch on the 27th of March, and just before he left McComb, at 4 p. m. on
27 the 27th of March, 1883, he asked McComb what he should do if De Bardeleben refused his offer of $350,000; that McComb said that if De Bardeleben refused the offer of $350,000, then he would take the notes at De Bardeleben's proposition—that is, at eight per cent. per annum discount; that he, plaintiff, then went from New York over to Philadelphia; that the next day he received the following telegram from De Bardeleben:

BIRMINGHAM, ALA., *March* 28, 1883.

T. Adams, 833 Broad St.:

Cannot accept offer H. F. De Bardeleben.

That immediately and by the same messenger who brought to him said telegram of De Bardeleben refusing the offer he sent the following telegram to De Bardeleben:

"PHILADELPHIA, PA., *March* 28, 1883.

H. F. De Bardeleben:

Have made the negotiation on the terms you gave me. Bring on your papers with Smith's opinion on the matters I mentioned to you. Let me know here when I shall meet you in New York.

(Signed) T. ADAMS."

That on the 29th of March he, plaintiff, received the following despatch from De Bardeleben:

BIRMINGHAM, ALA., *March* 29, 1883.

T. Adams:

You are too late; have disposed of the notes.

H. F. DE BARDELEBEN."

That on the 30th of March plaintiff sent the following despatch to De Bardeleben:

PHILADELPHIA, PA., *March 30th*, 1883.

H. F. De Bardleben:

28 You are too late. You gave me explicit authority to sell at certain price, you to pay my commission. I wired you an offer I had below price you had named. You answered you could not accept offer, but said nothing about withdrawal of my authority to sell. I then sold to J. J. McComb, of Dobbs Ferry, New York, on terms authorized by you, and you should confirm that sale forthwith. Answer.

T. ADAMS."

That on the 31st of March he received the following despatch from Be Bardelaben:

"BIRMINGHAM, ALA., *March* 31, 1883.

T. Adams, 833 Broad St.:

Your effort to beat me down in price has lost you the notes; will write.

(Signed) H. F. DE BARDELEBEN."

That on the 2nd day of April he sent the following despatch to De Bardelaben:

"PHILADELPHIA, PA.

H. F. De Bardelaben:

Assumptions of your despatch wholly unfounded; no effort to beat you down; reported you the offer had. You refusing the first offer led me to dispose of the notes at your offer, which I did, and so reported to you.

T. ADAMS."

That plaintiff received the following letter from De Bardeleben two of three days after it had been written:

BIRMINGHAM, ALA., *March 31st*, 1883.

T. Adams, Esq., Philadelphia, Pa.

DEAR SIR: I telegraphed you this a. m.: "Your efforts to beat me down in price has lost you the notes; will write," which I
29 now confirm. When you left me on the hotel piazza you said that if Gov. Smith pronounced the papers all right you would take one-half and McComb the balance, you to telegraph me so soon as you got home. When I received your telegram offering me three hundred and fifty thousand dollars I saw you were trying to make me take as little as you could, which was not in accordance with our understanding, so I at once took steps to sell to another party, which I have done. I am very sorry it has turned out so, as I expected to have you in my big coal company that I am now forming, you to do the financiering and I to get the property in shape, by which each would have made a quarter of a million dollars. I very much regret that it looks as though we will not be in-

terested together. No dou-t you will see Senator Plumb, who will tell you what our scheme is. Give my regards to your son.

Respectfully, H. F. DEBARDELEBEN,
By F. H. ARMSTONG.

The plaintiff then, without objection upon the part of defendant, introduced as evidence all of said telegrams and letters. The plaintiff was asked on cross-examination if he had given or stated all the telegrams which he had sent to De Bardeleben during the time covered by the said telegrams, as stated by him. He said to the best of his recollection he had. The defendant then handed him a despatch in the following words:

NEW YORK, *March* 28, 1883.

H. F. De Bardeleben:

Pleas- answer my telegram of yesterday.

T. ADAMS.

and asked him if he did not send said dispatch. After some hesitation, he said possibly he might have done so, but had no recollection of going back to New York on the 28th. He was then asked by defendant if he had not given McComb authority to send said dispatch in his name; to which he said, Possibly I may have done so, but I have no recollection of it. Upon further cross-examination, he said he had not sent said dispatch nor had he any recollection that he authorized McComb to send it in his name.

He further testified, on cross-examination, that he told McComb that De Bardeleben wanted money very badly, and that he wanted it as soon as possible; that he told McComb this while talking to him about the sale of said notes. This witness further testified that he received the following letter from Frank L. Wadsworth, enclosing W. H. Smith's opinion, as follows:

MARCH 27TH, 1883.

T. Adams, Esq., 833 North Broad St., Philadelphia, Pa.

DEAR SIR: Herewith I hand you enclosed opinion of Gov. Smith with reference to my authority, as trustee, to dispose of the notes named. Should you desire any further information, please advise Mr. Debardeleben or myself.

Very truly yours, F. L. WADSWORTH
F. H. A.

BIRMINGHAM, ALA., *March* 27, 1883.

Mr. T. Adams.

DEAR SIR: On yesterday Mr. Frank L. Wadsworth submitted to me a paper purporting to be a deed of trust executed by Henry De Bardeleben, conveying all his property of every description in trust to said Frank L. Wadsworth for the benefit of the wife and children of the grantor, and requested me to write you whether or not he, Wadsworth, would be auth-rized under the powers conferred by said deed of trust to make an assignment or transfer of certain notes of the Pratt Coal and Coke Company, payable to him as trustee, for

six hundred thousand dollars in the aggregate. I have carefully examined the paper and am of the opinion that the powers conferred are ample for that purpose.

I am, very respectfully, W. H. SMITH.

And, upon proof of the handwriting of Frank L. Wadsworth, said letter with Smith's opinion was introduced as evidence in this cause.

The plaintiff was further asked, on cross-examination, who promised to pay him ten thousand dollars for selling said notes. He answered, De Bardeleben. He was asked if Frank L. Wadsworth was present when the contract was made; he answered he was not.

32 In connection with his statement that De Bardeleben promised to pay him ten thousand dollars for selling the notes, the plaintiff stated that the promise was made at the time De Bardeleben employed him to sell the notes, and that at that time De Bardeleben told him that the said notes were payable to Wadsworth and the mortgage by which they were secured was executed to him; that Wadsworth held said notes and mortgage in trust for the wife and children of De Bardeleben, and that the sale of the notes would have to be by Wadsworth as such trustee; that plaintiff also testified that, after leaving said McComb on the afternoon of the 27th of March, 1883, he (plaintiff) did not see or have any communication with said McComb in relation to said notes or their sale or purchase.

Plaintiff further testified, on cross-examination, that he never agreed to become a purchaser of said notes with McComb or any other person, and he further testified that his authority to sell said notes was not withdrawn until after he had sold the same to McComb and notified De Bardeleben thereof.

This was all the testimony of this witness.

The plaintiff then introduced as a witness Gov. W. H. SMITH, who testified as follows:

That on or about the 26th day of March, 1883, H. F. De Bardeleben or Frank L. Wadsworth presented him a deed of trust executed by H. F. De Bardeben, conveying certain property to Frank L. Wadsworth in trust for the wife and children of De Bardeleben, stating that Mr. Adams wanted his (Smith's) opinion as to whether or

33 not the trustee could transfer the said notes; that he examined the deed, and the next morning wrote the opinion which has been offered in evidence, and handed it, according to his best recollection, to Frank L. Wadsworth.

This was all the evidence of W. H. Smith.

The plaintiff then introduced the deposition of J. J. MCCOMB, and his testimony was as follows:

That he was acquainted with the parties to this suit; that he had known the plaintiff, Theodore Adams, for thirty-five years; that he made a contract with Adams in New York city on the 27th day of

March, 1883, for the purchase, through him, of five notes made by the Pratt Coal and Coke Company, payable to Frank L. Wadsworth, as trustee, in the sum of one hundred thousand dollars each; that by the terms of his said contract with Adams he (witness) was to take said notes at eight per cent. per annum discount; that the proposition by Adams to sell witness said notes was made in his (witness's) office, No. 35 Broadway, New York city, on the 27 of March, 1883; that he did not accept the proposition immediately, but set his book-keeper to work on a careful calculation as to what the result would be to him (witness) on the said notes if he purchased them on the terms offered and on the supposition *that* he (witness) should borrow the money at six per cent. to carry — the transaction; that while this calculation was being made he discussed the matter with Adams, and suggested that he (Adams) should telegraph an offer of a lump sum of three hundred and fifty thousand dollars for the five notes of one hundred thousand dollars each, which Adams; after some hesitation, did; that afterwards and before parting witness told Adams that if this
31 offer was declined he would take the notes on the terms offered, namely, eight per cent. per annum discount, and that in either case he (witness) was the purchaser of the notes; that Adams told him he was authorized to make the sale; that all this transpired in his office, No. 35 Broadway, New York city, at one interview. Witness further testified that at the time he made said contract with Adams he was engaged in the cotton-tie business, and as capitalist, with ample means invested in securities, he was abundantly able to make the purchase of said notes, and that immediately on determining to do so he made financial arrangements for the money to carry out the contract; that the arrangements he made for carrying out the contract was to inquire at the trust company where he was in the habit of borrowing money if he could rely upon them letting him have the money within a few days to pay for these notes; that they told him that he could rely upon it; that he was greatly disappointed by the failure to get the notes, as, in his then attitude t-wards the Pratt Coal and Coke Company, their possession in his hands would have been — advantage to him beyond the profit, which in itself was no small consideration, as it would have amounted, on the six per cent. basis, to about one hundred thousand dollars.

The foregoing was all the evidence introduced by the plaintiff.

The defendant thereupon introduced as a witness H. F. DE BARDELEBEN, who testified substantially as follows:

That he resides in Birmingham, Alabama; that in the
35 spring of 1883 he was interested in the Pratt Coal and Coke Company; that he was about to make a trade in which he would need some money; that several years before, being in bad health, he had conveyed his property to Frank L. Wadsworth, as trustee for his wife and children, reserving a support for himself in said property; that said Frank L. Wadsworth had as such trustee 5

notes of one hundred thousand dollars each, payable to said Wadsworth at one, two, three, four, and five years after date, without interest, and secured by a mortgage of the Pratt Coal and Coke Company; that he met the plaintiff, Theodore Adams, in Birmingham some time in March, 1883; that he told Adams about his business and told him that he wanted to sell said notes; that they were well secured; that he took said Adams out to the Pratt Coal and Coke Company mines and showed him the property of said company, so that he could see for himself that the security for said notes was good; that he had a conversation on the cars, going and returning from the mines, with plaintiff in regard to his (De Bardeleben) business and the sale of these notes; that on the evening the said Adams left for New York he had another conversation with him (Adams), in which he proposed to sell said 5 notes at 8 per cent. per annum discount, and asked Adams if he thought he could find a purchaser. Adams said he thought he could, and that he thought a friend of his in New York, J. J. McComb, would take the notes on those terms. He (De Bardeleben) then proposed to give said Adams ten thousand dollars if he would sell said notes at 8 per cent. per annum discount; that Adams agreed to the proposition; that as Adams was leaving he said to De Bardeleben that he would take half the notes himself, and he thought that said McComb would take the other half on the terms proposed by De Bardeleben, and that as soon as Adams reached his home he would telegraph De Bardeleben.

The defendant asked said De Bardeleben the following questions, to which he made the following answers:

1st. Who made the contract with the plaintiff to sell said notes?

To which said De Bardeleben answered, "I did."

2. Who promised to pay the plaintiff the ten thousand dollars as commissions for selling said notes?

To which he answered, "I did."

Said De Bardeleben further testified that he made the contract for himself and not as agent for any one; that Wadsworth was not present when the contract was made or during its negotiations; that while plaintiff was waiting for the train down at the Relay House he (De Bardeleben) told plaintiff that he (De Bardeleben) had some checks on hand in which he would need some money, and that he would need it very soon and badly; that on the 28 of March, 1883, he received the telegram of the 27th of March from plaintiff, it being the same telegram referred to by plaintiff in his testimony offering $350,000 for the notes, and about the same time he received the telegram of March 28th from plaintiff, it being the same shown plaintiff and which he (plaintiff) denied sending, and which is in words and figures as follows:

"NEW YORK, *March 28th*, 1883.

H. F. De Bardeleben:

Pleas- answer my telegram of yesterday.

T. ADAMS."

That he (De Bardeleben) thereupon immediately sent the telegram of the 28th, mentioned by the plaintiff, and heretofore set out in the plaintiff's testimony, refusing the offer of $350,000; that when he received the telegram offering $350,000, and the said telegram of the 28th March, requesting an answer to the said telegram of the 27th of March, he (De Bardeleben) was taking to Col. Enoch Ensley, who then proposed to give him for said notes three hundred and eighty thousand dollars, it being 8 per cent. per annum discount upon said notes; that he, De Bardeleben, thereupon sold said notes to said Enoch Ensley for 380,000; that afterwards, on the morning of the 29th of March, 1883, he received the telegram of Adams of the 28th, notifying witness of the sale of the notes on his (De Bardeleben) terms, being at the same sum of 380,000; that, having sold the notes before receiving this despatch, he sent Adams the despatch of the 29th of March, it being the same despatch referred to by plaintiff in his testimony and which has been heretofore set out in the testimony of the plaintiff; that the next day he received the telegram of the 30th from plaintiff, it being the same telegram referred to by the plaintiff in his testimony and offered in evidence by plaintiff in this cause; that on the 31st of March he sent in reply to this telegram the despatch of the 31st, it being the same telegram testified to by the plaintiff and offered in evidence by him; that on the 2nd day of April he received from plaintiff the telegram testified to by plaintiff as having been sent by him on the 2nd day of April in reply to said telegram of witness of the 31st
38 of March, and which has been introduced by plaintiff as evidence in this cause and hereinbefore set out in words and figures; that on the same day he (witness) sent said telegram of 31st of March; he (witness) wrote the letter of that date which was referred to and introduced in evidence by the plaintiff and hereinbefore set out in plaintiff's testimony; that he (witness), at plaintiff's request, had W. H. Smith to examine the deed of trust and to give an opinion as to whether or not Wadsworth, as trustee, could transfer said 5 notes; that on the morning of the 27th of March he (witness) sent Wadsworth to said W. H. Smith for his opinion in said matter and Wadsworth brought said opinion back and wrote the letter referred to in the testimony of plaintiff, it being the letter introduced in evidence by plaintiff as a letter of Wadsworth, enclosing said opinion of the said Smith to plaintiff, which letter and opinion are hereinbefore set out in plaintiff's testimony; this was done because plaintiff requested witness to have said opinion of said Gov. W. H. Smith as to whether or not Wadsworth could transfer, as trustee, said notes. Said letter enclosing said opinion was written and mailed before witness received the said telegram of plaintiff offering 350,000 for the said notes or any other telegram from plaintiff. This witness was asked on cross-examination if in the trust deed to Wadsworth he did not convey all of his property. He answered that at that time he had other property; that he had, in addition to the property in said trust deed, a saw-mill, 30,000 acres of land, and 8 or 10 miles of railroad. He further said on cross-examina-

tion that a sale of the Pratt Coal and Coke Company notes was not necessary for his support.

39 The defendant then proved by one E. B. Hovis that the telegram of the 28th of March, 1883, hereinbefore set out, and which is in words and figures as follows:

"NEW YORK, *March 28th*, 1883.

H. F. De Bardeleben:

Pleas- answer my telegram of yesterday.

T. ADAMS."

was rece-ved by him, as operator, at the telegraph office in Birmingham, Alabama, on the 28th day of March, 1883, and that it purported to be from T. Adams, addressed to H. F. De Bardeleben, and that the same was delivered to said De Bardeleben. The defendant then introduced said telegram of the 28th in words and figures as follows:

"NEW YORK, *March* 28, 1883.

H. F. De Bardeleben:

Pleas- answer my telegram of yesterday.

T. ADAMS."

On cross-examination H. F. De Bardeleben testified that the agreement between him and Enoch Ensley in relation to said notes was not in writing; that he simply said to Ensley that he could have the notes for three hundred and eighty thousand dollars, and Ensley said he would take them at that price; that the notes were in the possession of F. L. Wadsworth, and that witness did not know where said Wadsworth was at that time; did not know whether he was in Birmingham or not; said De Bardeleben did not deliver the notes to Ensley for several months thereafter. He, witness, testified that they were in the hands of Wadsworth, and that it took considerable maneuvering on his part to get them for delivery to Ensley.

The foregoing was all the testimony in this cause.

40 Upon the foregoing evidence the court charged the jury that the plaintiff was a special agent, clothed with special power to sell the five notes at a price specified by De Bardeleben, and that if when the plaintiff, on March 27, 1883, first offered to sell said notes at said specified price to J. J. McComb the said McComb did not express any acceptance of the offer, but told plaintiff to telegraph to said De Bardeleben a lump offer of three hundred and fifty thousand dollars, and also told plaintiff that if De Bardeleben declined that offer he (McComb) would take the notes at the price originally specified by De Bardeleben, amounting to three hundred & eighty thousand dollars; if afterwards and in the same interview on said March 27, 1883, said McComb, in relation to said five notes, told plaintiff that if the said offer of three hundred & fifty thousand dollars was declined he (McComb) would take the notes on the terms first offered, viz., eight per cent. discount, and that in either case he (McComb) was the purchaser of the notes, all this amounted

to a conditional offer only to take the notes at the specified price first offered, and did not impose upon the plaintiff the duty or obligation to communicate to his principal the fact that McComb was ready and willing to buy the notes at the said price at which they were first offered, amounting to three hundred & eighty thousand dollars; and the failure of plaintiff to communicate that fact in any manner to his principal was not a breach of his duty nor bad faith in itself, as he was only a special agent to sell at a
41 fixed, specified price, and not an agent to get the best price he could obtain. To this charge thus given by the court, as well as to each proposition contained therein, the defendant duly excepted.

2. The court also charged the jury that the present suit was properly brought against said Frank Wadsworth as an individual, & that it was not necessary to sue him as trustee. To this charge, as well as each proposition therein contained, the defendant duly excepted.

3. The court also charged the jury that the court felt bound to refuse the charge which defendant had asked to the effect that if all the evidence was believed by the jury, their verdict should be rendered for defendant. Such a charge as that, when asked by defendant, could only be properly given when there was a want or absence of evidence sustaining plaintiff's case. To this charge, as well as to each proposition contained therein, the defendant duly excepted.

4. The court also charged the jury that, as the plaintiff was a special agent to sell the notes at a specified price, if the plaintiff made a sale of the five notes to said McComb at the specified price and McComb was ready and willing to comply with that sale and was prevented by De Bardeleben's sale of the notes to Ensley,
42 the plaintiff was entitled to recover in this suit the compensation which had been promised for making such sale. To this charge, as well as to each proposition therein contained, the defendant duly excepted.

The defendant, in writing, duly requested the court to give the following charge:

1. If the jury believe the promise to pay plaintiff ten thousand dollars, alleged in the complaint, was made by De Bardeleben for himself and not for Wadsworth as trustee or as an individual, and if the promise to pay the plaintiff ten thousand dollars, alleged in the complaint, was never made by Frank Wadsworth, then upon this state of facts the jury should find a verdict for the defendant, who is the administrator of said Frank Wadsworth.

The court refused to give this charge thus requested by defendant, and to this refusal the defendant duly excepted.

The defendant, in writing, also duly requested the court to give the following charge:

2. The single count in the complaint in this case alleges as the foundation of plaintiff's right to recover an express promise by Frank L. Wadsworth to pay plaintiff ten thousand dollars, as is more fully shown in that complaint; and unless from the evidence

the jury are satisfied that said Frank Wadsworth made said
43 promise as alleged in the complaint, the jury should find a verdict for the defendant.

The court refused to give this charge thus requested by defendant, and to this refusal the defendant duly excepted.

The defendant, in writing, also duly requested the court to give the following charge: If the jury beli-ve all the evidence, this verdict should be rendered for the defendant. The court refused to give this charge thus requested, and to this refusal the defendant duly excepted; and the defendant tenders this as his bill of exceptions in open court and in term time, and the same is signed, sealed, and allowed by the presiding judge of said circuit court as the defendant's bill of exceptions, and is made part of the record this October 5th, 1886.

JOHN BRUCE, *Judge*. [SEAL.]

Endorsements: 28. Theodore Adams *vs.* Wm. D. Wadsworth, adm. of Frank L. Wadsworth. Bill of exceptions. Filed in clerk's office this 1st day of January, A. D. 1887. A. W. McCullough, clerk.

44 *Writ of Error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judge of the circuit court of the United States for the southern division of the northern district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, in a suit between Theodore Adams and William D. Wadsworth, as administrator of the estate of Frank L. Wadsworth, deceased (which judgment was rendered whilst the Honorable John Bruce, judge of the district court of the United States for the northern district of Alabama, was presiding in and holding said circuit court), a manifest error hath happened, to the great damage of the said William D. Wadsworth, as administrator of the estate of Frank L. Wadsworth, deceased, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at
45 Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

said Supreme Court, the 27th day of November, in the year of our Lord one thousand eight hundred and eighty-six.

A. W. McCULLOUGH,
Clerk of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Accept. Service.

We, being attorneys of record of the within-named defendant in error, Theodore Adams, do hereby, as such attorneys, accept due service of the within writ of error, which has been duly issued and deposited, with a copy thereof, for said defendant in error, in the office of the clerk of the said circuit court mentioned in the said writ of error November 27, 1886.

SMITH & BRADFORD,
Att'y- for Defendant in Error.

Endorsed: Theorde Adams *vs.* William D. Wadsworth, as administrator of Frank L. Wadsworth. The within writ of error duly issued, as well as a copy thereof for said Theodore Adams, was this day filed & deposited in my office, this Nov. 27, 1886. A. W. McCullough, clerk of the circuit court of the United States for the southern division of the northern district of Ala. A true copy. Test: A. W. McCullough, clerk.

46 *Citation.*

The United States of America to Theodore Adams, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern division of the northern district of Alabama, wherein William D. Wadsworth, as administrator of the estate of Frank L. Wadsworth, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in *the* behalf (which judgement was rendered by said circuit court whilst the Honorable John Bruce, judge of the dist-ict court of the United States for the northern dist-ict of Alabama, was presiding in and holding said circuit court.)

Witness the Honorable John Bruce, judge of the circuit court of the United States for the northern district of Alabama, this 27 day of November, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN BRUCE, *Judge.*

47 *Accept. Service.*

We, being attorneys of record of the within-named defendant in

error, Theodore Adams, do hereby, as such attorneys, accept due service of the within citation, duly issued and directed to said Theodore Adams, November 27, 1886.

SMITH & BRADFORD,
Att'ys for Def't in Error.

Endorsements: The within citation was this day duly filed in my office, with a copy thereof for said Theodore Adams, November 27, 1886. A. W. McCullough, clerk of the circuit court of the United States for the southern division of the northern district of Alabama. Test: A true copy. Test: A. W. McCullough, clerk.

48 *Bond.*

Know all men by these presents that we, William D. Wadsworth and H. F. De Bardeleben and S. T. Brittle and William Berney, are held and firmly bound unto Theodore Adams in the full and just sum of twenty thousand dollars, to be paid to the said Theodore Adams, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27 day of November, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a circuit court of the United States for the southern division of the northern district of Alabama, begun & held in the United States court-rooms, in the city of Birmingham, in said division of said district, on the first Monday of September, A. D. 1886, present and presiding in said court the Honorable John Bruce, judge of the district court of the United States for the northern district of Alabama, in a suit pending in said court between said Theodore Adams and the said William D. Wadsworth, as administrator of Frank L. Wadsworth, deceased, judgment was rendered against the said William D. Wadsworth, as the administrator of the estate of Frank L. Wadsworth, for twenty thousand eight hundred
48½ dollars, together with the costs in that behalf expended, and the said William D. Wadsworth, as administrator as aforesaid, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to recover the said judgment in the aforesaid suit, and a citation directed to the said Theodore Adams, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said William D. Wadsworth, as administrator as aforesaid, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

W. D. WADSWORTH, *Adm'r.* [SEAL.]
H. F. DE BARDELEBEN. [SEAL.]
S. T. BRITTLE. [SEAL.]
WILLIAM BURNEY. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
JOHN BRUCE, *Judge.*

We, being attorneys of record of the within-named Theodore Adams, the defendant in error, do hereby, as such attorneys, express our opinion that the within writ of error bond is good & sufficient and fit to be approved.
November 27, 1886.

SMITH & BRADFORD,
Att'y- for Def't. in Error.

Endorsements: The within writ of error bond was filed
49 in my office this November 27, 1886. A. W. McCullough, clerk of the circuit — of the United States for the southern division of the northern district of Alabama. A true copy. Test: A. W. McCullough, clerk.

UNITED STATES OF AMERICA, }
Northern District of Alabama. }

I, A. W. McCullough, clerk of the circuit court of the United States of America in and for said district, do hereby certify that the above and foregoing is a true, full, and complete transcript of the proceedings of said court and agreements of counsel in the case of Theodore Adams *vs.* Wm. D. Wadsworth, adm'r of Frank L. Wadsworth, as fully as the same does appear of record in my office, and I hereto attach the original writ of error in said cause.

Seal Circuit Court U. S., Sou. Div., N. D. of Ala.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of Huntsville, in said district, this — day of March, A. D. 1887.

A. W. McCULLOUGH,
Clerk of the U. S. Circuit Court.

50 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the southern division of the northern district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, in a suit between Theodore Adams and William D. Wadsworth, as administrator of the estate of Frank L. Wadsworth, deceased (which judgment was rendered whilst the Honorable John Bruce, judge of the district court of the United States for the northern district of Alabama was presiding in and holding said circuit court), a manifest error hath happened, to the great damage of the said William D. Wadsworth, as administrator of the estate of Frank L. Wads-

worth, deceased, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of November, in the year of our Lord one thousand eight hundred and eighty-six.

Seal Circuit Court U. S., Sou. Div., N. D. of Ala.

A. W. McCULLOUGH,
Clerk of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Allowed by—
JOHN BRUCE, *Judge.*

51 [Endorsed:] Theodore Adams *v.* William D. Wadsworth, as adm.inistrator of Frank L. Wadsworth. The within writ of error duly issued, as well as a copy thereof for said Theodore Adams, was this day filed & deposited in my office, this November 27, 1886. A. W. McCollough, clerk of the circuit court of the United States for the southern division of the northern district of Alabama. Recorded in Final Record Book A, page- 292, 293.

We, being attorneys of record of the within-named defendant in error, Theodore Adams, do hereby, as such attorneys, accept due service of the within writ of error, which has been duly issued and deposited, with a copy thereof for said defendant in error, in the office of the clerk of the said circuit court mentioned in the said writ of error, November 27th, 1886.

SMITH, BRADFORD,
Att'y- for Defendant in Error.

[Endorsed:] No. 28. Theodore Adams *vs.* Wm. D. Wadsworth, adm'r of Frank L. Wadsworth.

Endorsed on cover: N. Alabama C. C. U. S. No. 152. William D. Wadsworth, as administrator of the estate of Frank L. Wadsworth, deceased, plaintiff in error, *vs.* Theodore Adams. Filed October 7, 1887.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WILLIAM D. WADSWORTH,
AS ADMINISTRATOR OF THE ESTATE OF
FRANK L. WADSWORTH, deceased,
PLAINTIFF IN ERROR,
vs.
THEODORE ADAMS.

No. 152.

In error to the Circuit Court of the United States for the Northern District of Alabama.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN T. MORGAN,
Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WILLIAM D. WADSWORTH,
AS ADMINISTRATOR OF THE ESTATE OF
FRANK L. WADSWORTH, deceased.
PLAINTIFF IN ERROR,
vs.
THEODORE ADAMS,

No. 152.

In error to the Circuit Court of the United States for the Northern District of Alabama.

STATEMENT OF THE CASE.

On the 1st day of October, 1886, a judgment was rendered on the verdict of a jury, in favor of Theodore Adams, against William D. Wadsworth as the administrator of Frank L. Wadsworth, deceased, for $12,800.00, besides costs, "to be levied on the lands and tenements, goods and chattels, *and choses in action*, of the said estate of Frank L. Wadsworth, deceased, for the satisfaction of this judgment."

The suit was brought against Frank L. Wadsworth, who died after the service of the summons and complaint, and was, by consent of counsel, revived as against the plaintiff in error, under a stipulation which was filed and made a part of the record in the cause. The stipulation is set forth on page 7 of the record, and closes as follows: "If this cause is one that cannot be revived against the admin-

istrator of the defendant (he) is not to be prejudiced by this agreement that it shall be revived."

The action is based on an alleged agreement made and entered into between the plaintiff, Theodore Adams, and the defendant, Frank L. Wadsworth, on the 15th of March, 1883, for the breach of which damages are claimed. In the complaint, it is alleged that Adams, at the instance and request of Frank L. Wadsworth, promised him that he would endeavor and undertake to find a purchaser of five promissory notes of the face value of one-hundred thousand dollars each, held and owned by Wadsworth, and made by the Pratt Coal and Coke Company, a corporation, and payable to Frank L. Wadsworth, or bearer, "Said purchaser, to be found by the plaintiff as aforesaid, *was to take said notes* at a discount of eight per cent per annum *and was to pay the defendant therefor in cash*, and the defendant promised to pay the plaintiff the sum of ten thousand dollars *to have said notes discounted* as aforesaid, and the plaintiff was empowered by the defendant to negotiate a sale of said notes at a discount of eight per centum as aforesaid, *and as compensation for making such sale*, the defendant promised as aforesaid to pay the plaintiff said sum of ten thousand dollars."

The breach of this agreement is alleged to be the refusal of Wadsworth to pay $10,000 to Adams, "*for negotiating the said sale to said McComb.*"

The performance of his part of the agreement is stated by Adams, in his complaint, as follows: "on, to wit: the 28th of March, 1883, the plaintiff for and on behalf of the defendant, *Contracted with J. J. McComb*, of New York, *for the sale* of said notes to the said McComb at a discount of eight per centum, and the said McComb agreed to take said notes at said price in cash, and the plaintiff for and on behalf of the defendant, *agreed to sell* to the said McComb the said notes at the discount aforesaid."

The failure of performance, on the part of Wardsworth is alleged to be that "*notwithstanding said agreement* between the plaintiff, *for the defendant, and the said McComb*, on to wit, the 29th day of March, 1883, although the said McComb, on the said 29th day of March, 1883, offered to pay the defendant the price agreed upon for said notes between the plaintiff and said McComb as aforesaid, and the defendant still *refuses and neglects to sell* said notes to said McComb under the agreement between the plaintiff and McComb aforesaid."

The first and third pleas to this complaint were the general issue, and the second plea, to which a demurrer was overruled, alleges the following: "that the whole of the duties of the plaintiff as agent, in respect to said notes was not faithfully performed by him; but, on the contrary, the plaintiff, as agent as aforesaid, was guilty of gross misconduct as well as fraudulent concealment in withholding and concealing from his principal the facts which existed and were known to plaintiff as such agent, that the said J. J. McComb, to whom the plaintiff as such agent had offered to sell said notes at eight per cent. discount from their face, *was ready and willing to buy said notes* at eight per cent. discount from their face."

The plea adds to this averment of fraudulent concealment, the following allegations of fraudulent deception of his principal by Adams, and of connivance with McComb in the effort to obtain from the defendant still easier terms, and greater profits in the purchase of the five votes, viz.: "and the plaintiff, with knowledge of the facts above stated, acted upon the suggestion of said McComb and telegraphed to the principal an offer of a lump sum of three hundred and fifty thousand dollars for the said five notes of one hundred thousand dollars each, *with the intention thereby to induce said principal to authorize a sale of said notes at the sum of three hundred and fifty thousand dollars,*

when at the very time the plaintiff knew that said Mc Comb was ready and willing to buy the said notes at eight *per cent.* discount from their face; and the plaintiff avers that by the wrongful and fraudulent effort of the plaintiff above stated to induce and cause a sale of said notes at three hundred and fifty thousand dollars, the plaintiff grossly violated his duties as agent and lost the sale of the notes."

Issue was joined on each of these pleas. Four pleas are mentioned in the judgment entry in the case, as having been submitted to the jury, but this is a clerical misrecital in the record.

ASSIGNMENTS OF ERROR.

The plaintiff in error assigns the following grounds of error upon the record in this cause.

1. That the Circuit Court erred in rendering judgment against William D. Wadsworth as the administrator of Frank L. Wadsworth, to be levied of the property of the decedants estate, he having been only a naked trustee of the property of the wife and children of De Bardeleben for the benefit of whose trust estate, the record shows, he was acting.

2. That the said Circuit erred in giving to the jury each of the several instructions set forth in the record, and numbered respectively 2, 3 and 4, and in the charge that is not numbered, but was first given to the jury, as the same is set forth on pages 21 and 22 of the record. And this assignment of error is made, separately, as to each of said instructions given to the jury by the Court.

3. And the said Circuit Court erred in refusing to give the charge numbered 1 which the defendant in said cause, in writing, requested the court to give to the jury.

4. And, in like manner, the plaintiff in error says that said Circuit Court erred in its refusal to give to the jury the charge numbered 2, which he, in writing, requested the court to give to the jury. And the plaintiff in error also assigns for error upon this record, that the Circuit Court refused to give the charge to the jury which is set forth on page 23 of the record in this cause, and is not numbered, which he, in writing, requested the court to give.

5. That the said Circuit Court erred in permitting the plaintiff to answer the question put to him as a witness for himself, by his attorneys, as follows: "Whether while in Birmingham he made any agreement with H. F. De Bardeleben, as the agent of Frank L. Wadsworth, in relation to a sale of any notes of the Pratt Coal and Coke Company."

6. The court erred as is shown by the bill of exceptions.

BRIEF OF LAW POINTS.

1. The court gave no adequate instructions to the jury as to the law applicable to the evidence in the cause, under which they could find a verdict.

On the contrary, the court usurped the functions of the jury and decided, that Adams was the special agent of F. L. Wadsworth, and that he had committed no fraud upon him.

Tracy *vs.* Swartwout, 10 Peters, 80.
Insurance Co. *vs.* Rodell, 95 U. S. 233.
Etton *vs.* The Bank, 11 Wheaton 59.
National Bank *vs.* City Bank, 103 U. S. p. 671.
Stoneker *vs.* Garrett, 48 Penn. St. 419.
McDowell *vs.* Bank, 20 Ala. 317.
37 Ala. 227. Savings Fund *vs.* Savings Bank.
36 Penn. St. 501.

2. Issue was joined on the 2d plea of the defendant, after a demurrer to it had been overruled, and the parties went to trial upon it, and the evidence offered by both parties proved it. Yet the Court, in effect, instructed the jury that it was no defense to the suit.

It is a plea of the fraudulent conduct of the plaintiff, which justified his dismissal as agent of the defendant, if that relation had ever existed, and would have supported the right of the defendant to rescind the contract with Mc Comb, if such contract had ever been made.

Butler *vs.* Watkins, 13 Wall. 457.

3. If F. L. Wadsworth was empowered as trustee, to sell the five notes of $100,000, belonging to the trust estate, he was only an agent for the *cestuis que trust*, and could not delegate the authority to H. F. De Bardeleben, to make Adams his agent to sell the notes to McComb.

There is no proof that Wadsworth made De Bardeleben his agent to sell the notes, or to appoint Adams, as the agent of anybody, to sell them. The court inferred the creation of both these agencies from facts that did not even remotely justify such inference.

Shankland *vs.* Washington, 5 Peters, p. 395.

Oliver *vs.* Piatt, 3 How. p. 485.

4. The deed of trust was not in evidence and there was no evidence as to its provisions, or powers, except the loose declarations of De Bardeleben, and he was assuming a power over the trust estate in direct contravention of what he stated these provisions were.

The court inferred from such evidence that the trustee had the power to sell the trust estate at a sacrifice equal to $100,000, to advance De Bardeleben's wishes to use the money in other speculations: (see De Bardeleben's letter to Adams, p. 15 of record) and also inferred that Wads-

worth had made De Bardeleben his agent, and De Bardeleben had made Adams his agent, to sell the notes for a fee of $10,000, for which Wadsworth had become personally liable by express agreement.

This judgment is the fruit of a very remote inference from an inapossible state of facts, if all, on any part, of the evidence is worthy of belief. The evidence is also strong, if not conclusive, that this is a case of purchase by Adams *per interpositum personam*, and that McComb had more to do in negotiating with De Bardeleben and sending telegrams in Adams name than Adams did. Michaud *vs.* Girod, 4 How. p. 560.

5. This court will not, even when the rights of third persons have attached, indulge the mere presumption that a *cestui qui trust*, who is only interested in the income, has lawful authority to sell the corpus of the trust estate. To support such a sale there must be positive proof that it is warranted by the terms of the trust deed.

6. No agreement was concluded between Adams and McComb for the sale of these notes.

There is no evidence that even tends to show that, after their only interview, on the 27th of March, McComb ever notified Adams that having failed in their plan to entrap De Bardeleben into taking $350,000 for the notes, he had taken them at the offer of $380,000.

The pretended sale of the notes on the 27th of March was postponed, as to its final acceptance, until the plan to defraud De Bardeleben was found to have failed, and the evidence does not show that after the miscarriage of that scheme, Adams and McComb had anything further to say to each other about the notes. On the contrary, Adams' testimony (record p. 14 and 15) shows that he did not see McComb, or communicate with him on that subject after the 27th of March, and it was then "that McComb said

that if De Bardeleben refused the offer of $350,000 *then* he would take the notes at De Bardeleben's proposition."

The court will not, in order to help out such a transaction, create, by legal intendment, the inference that Adams afterwards and before De Bardeleben's telegram of 29th March; made a final agreement to sell the notes to McComb.

7. De Bardeleben, when he suspected the fraud of Adams and McComb, promptly revoked Adams' agency.

That was not necessary, but it silenced all question as to his power, after that, to sell the notes. The case of *Stitt vs. Huidekopers*, 17 Wall, 384, is strongly in point. Hunt vs. Rousmanier, 8 Wheaton, p. 202.

8. No separate question of ratification of Adams' agency, or of his acts, by De Bardeleben was raised on the trial; but he could not increase Adams' powers, or create an agency in his favor by a ratification of his conduct.

Marsh vs. Fulton Co. 10 Wall, 676.

De Bardeleben could neither borrow nor take power from Wadsworth to give to Adams, and he had none of his own to delegate.

9. These notes and the mortgage to secure them were choses in action, and they were not assignable, while they were in the adverse possession of Frank L. Wadsworth, as trustee. Sheldon vs. Sill, 8 How. 441.

10. Frank L. Wadsworth had no personal interest in the trust estate, and his power was, by intendment of law, to administer it, and not to sell it.

Jaudon vs. National City Bank, 8 Blatchf, 430.

Curtis vs. Smith, 6 Blatchf, 573.

11. This transaction violates the policy of the law and neither Adams nor McComb have a right to have it carried into effect.

The contract between Adams and McComb made with

intent to cheat De Bardeleben, or Wadsworth, was so infected with a fraudulent purpose that neither party could have enforced it as against the other.

The contract cannot bind De Bardeleben, if it cannot be enforced as against his agent, or by his agent, as against McComb. Pratt v. Patterson 112 Pa St 467 S.

Randall vs. Howard, 2 Black, 585.

Wardell vs. U. P. Railroad, 103 U. S., 6

Jackson vs. Ludeling, 21 How. 616.

Wheeler vs. Sage, 1 Wall, 518. Story 342.

The case of Hume vs. The United St Term, 1890, states doctrines that are fatal to the legal or moral validity of the transaction between Adams and McComb.

13. The alleged sale by Adams to McComb, treated as a transaction by De Bardeleben, has not one element of validity, or obligation in law.

It cannot be supposed that a sane man would have made for himself such a double or conditional bargain as Adams tried to make for De Bardeleben with McComb.

It is certain that an agent, who attempted to make such an agreement for his principal was guilty of fraud.

Hume *es.* The U. S. *Supra.*

Adams' authority was revoked before McComb had made up his mind to give De Bardeleben's price for the notes.

There was no mutuality, or coincidence, of intent to sell the notes and agreement to take them.

Ownigs *es.* Hull, 9 Peters, p. 629.

Butler *es.* Watkins, 13 Wall, 456.

United States *es.* Peck, 101, U. S. 64.

Taylor *es.* Insurance Co., 9 How. 390.

McComb delayed his final acceptance of Adams' offer

until he had heard whether De Bardeleben would accept his offer of $250,000 for the notes.

Adams offered him the notes for $280,000. If De Bardeleben had made him the same offer, and he had replied "I will give you $250,000 cash," and De Bardeleben had said "I decline to accept your offer and withdraw mine," no trade would have been made, for McComb having declined to accept, there was not a concurrent assent to the same proposition.

Utely *vs.* Donaldson, 94 U. S., p. 47.

Dorsey *vs.* Packwood, 12 How., p. 138.

Marsh *vs* Fulton Co., 10 Wall, 676.

14. If the transaction disclosed in the evidence was valid in law, it was the trust estate and not Wadsworth, that was charged with the obligation to pay Adams $10,000 for selling the five notes; and the jurisdiction is in Equity and not at law.

Patton *vs.* Taylor, 7 How., p. 160.

Duval *vs.* Craig, 2 Wheaton, p. 56.

15. The judgment in this case holds Wadsworth and his estate liable in person for an act, which, if it was lawful, only bound the trust estate; and, if it was unlawful, cannot be enforced in this action.

16. The facts in this case, and the result of the trial, in fixing a liability on a trustee after his death, for an act that must have been lawful, if it had any validity, show that the jurisdiction is only in equity.

17. The testimony admitted by the court, against the objection of the defendant (record p. 12 and 13) proved a transaction with Frank L. Wadsworth, if it proved anything, and Adams was not competent under Sec. 858, Rev. Stat. to testify to such facts.

18. The refusal of the court to give the charge asked by the defendant and the reasons assigned for such refusal, in

charge 3, was misleading and erroneous. The court probably misapplied the doctrine in *Texas vs. Chiles*, 21 *Wall*, 488, in this case. That was a case of "non suit" on motion of the defendant.

POINTS, IN ARGUMENT, FOR THE PLAINTIFF IN ERROR.

The instructions given and those refused by the court, to the jury, present the chief questions raised by exceptions to the rulings of the court, on the trial of this cause.

1. All the evidence given on trial is set out in the record.

The record shows that "Upon the foregoing evidence the court charged the jury *that the plaintiff was a special agent, clothed with special power to sell the five notes at a price specified by De Bardeleben.* * * * * * * * and that he (the plaintiff) "was only a special agent to sell at a fixed specified price, and not an agent to get the best price he could obtain."

"The court also charged the jury that, as the plaintiff was a special agent to sell the notes at a specified price, if the plaintiff made a sale of the five notes to said McComb at the specified price and McComb was ready and willing to comply with that sale and was prevented by De Bardeleben's sale of the notes to Ensley, the plaintiff was entitled to recover, in this suit, the compensation which had been promised for making such sale."

These parts of the charge given to the jury assume that De Bardeleben was the agent of Frank L. Wadsworth to make the agreement with Adams, by which he was made the special agent of said Wadsworth to sell the five notes.

The charge goes further and states the finding of the court, both upon the law and the facts, that Adams was such special agent of F. L. Wadsworth.

This finding of the facts, upon testimony that was wholly insufficient, and was conflicting, as to the special agency of Adams for Wadsworth, was an invasion of the province of the jury.

Tracey *vs.* Swartwourt, 10 Peters, 80.

Insurance Co. *vs.* Rodell, 95 U. S. 238.

2. The evidence on the question of such special agency showed that Wadsworth had nothing to do with creating it. Adams never spoke or wrote a word to him about it, nor did De Bardeleben; nor did Wadsworth, in any way assent to it by word or act.

De Bardeleben testified (record p. 19) "*that he made the contract for himself and not as agent for any one; that Wadsworth was not present when the contract was made, or during its negotiations.*"

Adams testified (record p. 12) "*that he knew F. L. Wadsworth, but that he never had any conversation with him, or made any agreement with him, except through De Bardeleben, in relation to said notes.*"

The only evidence that even tended to connect Wadsworth with the transaction between Adams and De Bardeleben was this statement of Adams (record p. 12), in respect of sending the five notes to him at Philadelphia. He stated "that De Bardeleben had promised to send them, but that in point of fact, Wadsworth was standing nearby when De Bardeleben made the promise." Adams further testified, on cross examination, (record p. 17), as follows: "The plaintiff was further asked on cross examination, who promised to pay him $10,000 for selling said notes. *He answered De Bardeleben.* He was asked *if Frank L. Wadsworth was present when the contract was made; he answered he was not.*" "In connection with the statement that De Bardeleben promised to pay him $10,000 for selling the notes, the plaintiff stated that the promise

was made at the time De Bardeleben employed him to sell the notes, and that, at that time, De Bardeleben told him that the notes were payable to Wadsworth and the mortgage by which they were secured was executed to him; that Wadsworth held said notes and mortgage in trust for the wife and children of De Bardeleben, and that the sale of the notes would have to be by Wadsworth as such trustee."

3. On page 12, of the record, is found the following statement of Theodore Adams. "De Bardeleben then explained to the plaintiff that some years previous he was in failing health, and that he had conveyed all of his property to Frank L. Wadsworth, in trust, for his (De Bardeleben's) wife and children, with full authority to manage and control said estate, and that the notes of the Pratt Coal and Coke Company for $500,000 which he proposed to have discounted, were payable to said Frank L. Wadsworth, as trustee for his (De Bardeleben's) wife and children, and the mortgage to secure the same was executed to said Frank L. Wadsworth, as trustee for his, De Bardeleben's wife and children, and that *the agreement between said De Bardeleben and said Adams would have to be carried out by said Wadsworth, as trustee, for the wife and children of said De Bardeleben.*"

4. Adams testified (record p. 14) that on the 27th of March, 1883, he sent the following dispatch from New York to De Bardeleben:

NEW YORK, *March* 27, 1883.

H. F. De Bardeleben:

I can sell five notes, with mortgage, for three hundred and fifty thousand dollars cash, the right of the trustee to sell and transfer, being all right. Answer. T. Adams.

On the 28th of March, 1883, McComb, using the name of Adams, sent the following telegram:

NEW YORK, *March* 28, 1883.

H. F. DeBardeleben:

Please answer my telegram of yesterday.

T. Adams.

On pages 19 and 20 of the *record* is the following testimony of De Bardeleben, "that on the 28th of March, 1883, he received the telegram of 28th of March from plaintiff, it being the same telegram referred to by plaintiff in his testimony, offering $350,000 for the notes, and about the same time he received the telegram of March 28th from plaintiff it being, the same shown plaintiff and which he (plaintiff) denied sending, and which is in words and figures as follows:

"NEW YORK, *March* 28, 1883.

H. F. DE BARDELEBEN:

Please answer my telegram of yesterday.

T. ADAMS."

That he (De Bardeleben) thereupon immediately sent the telegram on the 28th of March, mentioned by the plaintiff "(cannot accept offer." H. F. De Bardeleben, record p. 14) and heretofore set out in the plaintiff's testimony; refusing the offer of $350,000; that when he received the telegram offering $350,000, and the said telegram of 28th of March, requesting an answer to the said telegram of the 27th of March, he (De Bardeleben), was talking to Col. Enoch Ensley, who then proposed to give him for said notes $380,000; that afterwards, on the morning of 29th of March, 1883, he received the telegram of Adams of 28th, notifying witness of the sale of the notes on his (De Bardeleben's) terms, being the sum of $380,000; that having

sold the notes before receiving this dispatch, he sent Adams the dispatch of 29th of March, it being the same dispatch referred to by plaintiff in his testimony and which has been heretofore set out in the testimony of the plaintiff."

"On cross examination (record p. 21), H. F. De Bardeleben testified that the agreement between him and Enoch Ensley in relation to said notes was not in writing; that he simply said to Ensley that he could have the notes for $380,0000, and Ensley said he would take them at that price; *that the notes were in the possession of F. L. Wadsworth*, and that witness did not know where said Wadsworth was at that time, did not know whether he was in Birmingham or not; said De Bardeleben did not deliver the notes to Ensley for several months thereafter. He, witness, testified that *they were in the hands of Wadsworth, and that it took considerable maneuvering on his part to get them for delivery to Ensley.*"

5. Against all this array of undisputed facts as to the point whether Adams was the special agent of Wadsworth, as the court stated that he was in the charge to the jury; there stands the solitary fact that Wadsworth wrote the following letter to Adams (record p. 16):

"March 27, 1883.

T. Adams, Esq.,

833 Broad Street,

Philadelphia, Pa.

Dear Sir:

Herewith I hand you enclosed opinion of Gov. Smith with reference to my authority as trustee, to dispose of the notes named. Should you desire any further information, please advise Mr. De Bardeleben or myself.

Very truly yours,

F. L. Wadsworth.

F. H. A.

Evidently this letter was written by F. H. Armstrong, clerk of De Bardeleben, but treating it as Wadsworth's admission, it is testified by De Bardeleben (record p. 20) "*that he (witness) at plaintiff's request*, had W. H. Smith to examine the deed of trust and to give an opinion as to whether or not Wadsworth, as trustee, could transfer said five notes: that on the morning of 27th March *he (witness) sent Wadsworth to said W. H. Smith for his opinion* in said matter and Wadsworth brought said opinion back and wrote the letter referred to in the testimony of the plaintiff * * * * this was done because plaintiff requested witness to have said opinion of said Gov. W. H. Smith, as to whether or not Wadsworth could transfer, as trustee, said notes."

6. Evidence could scarcely be more conclusive, or less controverted, to show that there had not been a transaction or a conversation or even a proposition, between Adams and Wadsworth, out of which the relation of special agent and principal could have arisen.

The court, in holding as matter of law and fact, that Adams was the special agent of Wadsworth to sell this trust property, must have had the impression that De Bardeleben had such an interest in this trust estate that he could appoint Adams as Wadsworth's agent to dispose of it. If he could have done that however, or, if he did that, it is far from being true that he could thus create an agreement between Wadsworth and Adams without Wadsworth's consent. But, De Bardeleben only had the right to a support out of this trust estate and had no right over the corpus of the trust. See record p. 18, folio 35.

De Bardeleben did not convey all his property to Wadsworth, trustee. He had not conveyed 30,000 acres of land that he owned, or the eight or ten miles of railroad, or a saw mill that he owned. "He further said on cross exam-

ination *that a sale of the Pratt Coal and Coke Company's notes was not necessary for his support.*"

So, if the court had the impression that De Bardeleben had any right of control over the trustee, or the trust estate, it was an erroneous impression.

7. The Supreme Court will not indulge the presumption that a *cestui qui trust* has the power to dispose of the corpus of a trust estate which belongs to others, when he only has the right to a support out of its income; or that he can bind the estate, or the trustee to a sale that he may make, without the consent of the trustee or of those who are the equitable owners of the trust estate.

The power of a trustee, in contemplation of law, is the power to administer, and not the power to sell the estate.

Jaudon *vs.* National City Bank, 8 Blatchf, 430.

Curtis *vs.* Smith, 6 Blatchf, 573.

8. The foregoing quotations of *undisputed facts* from the testimony in this case, also show conclusively that there was no agreement of any kind between Adams and Wadsworth, for the sale of the five notes, or for paying him (Adams) any sum for the negotiation of their sale.

It was error to refuse to give the second charge asked by the defendant, in writing, on the trial. And it was also error to refuse to give to the jury the first charge asked by the defendant.

The first charge asked by the defendant was as follows:

"If the jury believe the promise to pay plaintiff ten thousand dollars, alleged in the complaint, was made by De Bardeleben for himself and not for Wadsworth, as trustee or as an individual, and if the promise to pay the plaintiff ten thousand dollars, alleged in the complaint, was never made by Frank Wadsworth, then, upon this state of facts, the jury should find a verdict for the defen-

dant, who is the administrator of said Frank Wadsworth."

The second charge asked by the defendant, is the same in substance as the first, above quoted, viz:

2. The single count in the complaint in this case alleges as the foundation of the plaintiffs rights to recover, an express promise by Frank L. Wadsworth to pay the plaintiff ten thousand dollars, as is more fully shown by the complaint; and unless from the evidence the jury are satisfied that Frank Wadsworth made said promise as alleged in the complaint, the jury should find a verdict for the defendant."

9. The only conclusion the jury could draw from the refusal to give these charges was, *that the court had decided the entire case in the first charge given them* by holding that Adams was the special agent of Wadsworth to sell the notes to McComb at a fixed price of $380,000, that he offered the notes at that price to McComb, and McComb accepted the offer, if he could not get them for $350,000, and that Wadsworth had promised to pay Adams $10,000 for that service, which he had not paid, and that these facts entitled the plaintiff to recover for that breach of the agreement.

10. There was little use for the jury on that trial. *No question of fact was submitted to them by the court upon which they should base their verdict.*

They were only informed by the court that Adams was the special agent of Wadsworth to sell the five notes at a price specified by De Bardeleben, and *that the facts set forth in the second plea on which issue was joined*, after a demurrer to it had been overruled by the court, though proven, constituted no defense to the action.

That the allegations of the complaint were proven, the court assumed; and, that if the allegations of the second plea were proven, they were not a defense to the action.

This charge amounts to an instruction by the court to

the jury that they should find for the plaintiff, whether or not they believed that any fact alleged in the complaint was true, and notwithstanding they might believe that the facts set up in the second plea were true, upon the evidence.

No adjucated case can be found by which to test the legal validity of this instruction.

11. The effect of the first charge, given by the court, is to instruct the jury that the evidence in the case established the right of the plaintiff to recover, and overturned all the defenses set up by the defendant.

This was error:

First, because the evidence does not show that there was any agreement between Adams and Wadsworth.

Second, the evidence does not show that the relation of principal and agent existed between them.

Third, the law will not imply a promise from Wadsworth to Adams to pay him $10,000 when, to do so, it must mount over and pass beyond the fraud in the agreement of Adams with McComb, by which he was to get the five notes for $30,000 less than he had promised Adams to pay for them, provided they could, by their joint efforts, conceal the fact from De Bardeleben that the notes had been sold to McComb for $380,000 and thereby defraud him of $30,000.

Fourth, there is no count in the complaint on any implied agreement.

Fifth, because Adams agreed with McComb at the time of sale of the notes *and as part of the transaction*, that the sale should be for $350,000, instead of $380,000, if, by concealing the sale for the larger sum, De Bardeleben could be induced to take the smaller sum.

Sixth, the authority of Adams to sell the notes was revocable, for any fraud or concealment in his dealings with De Bardeleben, if not absolutely, and Adams by consenting to present the offer of McComb to pay $350,000 for the notes,

turned over the transaction to McComb and De Bardeleben, and abandoned any right he had to sell the notes for $380,000 and earn his fee of $10,000. De Bardeleben promptly rejected the offer. Adams' sale of the notes to McComb for $380,000, was not to be complete, according to its terms, until the effort to defraud De Bardeleben should be tried and had failed. After it failed, no new sale of the notes was ever attempted. The court was dealing with the contract for the sale of the notes, in which the agreement to defraud De Bardeleben was a condition, and not with a new sale made after the swindle was detected by De Bardeleben, and after Adams was dismissed for his fraud, as De Bardeleben's agent.

Adams saw McComb in New York on the 27th March, made the only contract with him that he ever made, left for Philadelphia the same day, after sending the new offer of purchase, by telegraph, to De Bardeleben, and did not return to New York until after March 29th, when De Bardeleben telegraphed him to Philadelphia; "You are too late, have disposed of the notes."

That contract contained two features, if Adams has truly stated it, viz: a sale of five notes to McComb for $380,000; and that sale was to be substituted by a sale of them for $350,000, if De Bardeleben could be deceived by the concealment of the fact that the sale for $380,000 had been made.

12. This was a bold fraud and conspiracy to rob De Bardeleben of $30,000 which the charge of the court holds that he is bound by, through the act of his special agent, in the same manner as if he had conducted the transaction in person.

It would have been impossible for De Bardeleben to have occupied the position towards this transaction that Adams did, for Adams, if his testimony is true, knew that

the notes had been sold to McComb when he telegraphed McComb's offer to purchase them at a sum $30,000 less than he had already agreed to pay for them.

If De Bardeleben had conducted this transaction as Adams did, and with all the knowledge he possessed, his plea would properly have been insanity, in answer to a suit by McComb, founded on such an agreement for the sale of the notes. Hume *vs.* The United States, October Term Sup. Court, 1889.

The only thing that can explain the conduct of Adams in this transaction, is the intent to defraud De Bardeleben, which he and McComb agreed to put in execution.

13. De Bardeleben testified (record p. 19.) "that as Adams was leaving he said to De Bardeleben that he would take half the notes himself, and he thought McComb would take the other half on the terms proposed by De Bardeleben, and that as soon as Adams reached his home he would telegraph De Bardeleben."

This, in connection with Adams' telegrams and his statement of his dealings with McComb, shows that they were jointly concerned in the speculation, and, instead of making $10,000 in fees and 3 per cent. per annum for five years on $500,000, on the trade, as De Bardeleben proposed it, they would make that with $30,000, added, if they could induce De Bardeleben to sell the notes for $350,000.

De Bardeleben's letter of March 31st, 1883, to Adams, (record p. 15) to which no reply was made (*offered in evidence by the plaintiff*,) strongly confirms his sworn statement quoted above. The statement of Adams (record p. 17) "that he never *agreed* to become a purchaser of said notes with McComb or any other person," is not a denial of what he "*said*" to De Bardeleben.

De Bardeleben did not hold that statement to be an agreement, as it related only to a sale of half the notes, when he wanted to sell all of them, because "he was very much

in need of money to carry out a scheme in which he expected to make a large amount of money." (Record p. 13, folio 26.)

This weak and evasive denial of De Bardeleben's statement is not sufficient to disprove it, when the conduct of Adams is examined in the light of the surrounding circumstances, and his motives are made apparent.

At the least, however, here is a conflict of evidence and a question of fraudulent intention on the part of Adams, that the charge of the court withdraws from the consideration of the jury.

14. McComb could not have compelled a specific performance, even as against De Bardeleben, of the contract to deliver the five notes to him, if he had tendered the $380,000 and demanded the notes, because he disaffirmed that contract after it was made with Adams, by offering De Bardeleben, $350,000 for them. Nor could he have compelled De Bardeleben to deliver the notes under the first contract for $380,000, because he withheld from him all knowledge of its existence, and used it as a means to defraud De Bardeleben.

The element of concurrence of action and consent, and of mutuality of agreement was wanting between them and, when McComb made a different offer, De Bardeleben withdrew his consent to both propositions, as he had the right to do, and prevented the sale to McComb.

As to McComb, De Bardeleben had the right to withdraw his offer of sale, at any time before its acceptance.

He also had the right to withdraw it before he was notified of its acceptance. McComb accepted it only on the condition that he could not get the notes for less money, and De Bardeleben withdraw the offer before McComb notified him that, having failed in his effort to defraud him, he was prepared, honestly, to accept the original offer of De Bardeleben.

15. As between McComb and Wadsworth there was no negotiation, no agreement and no sale, and McComb never demanded of him, or De Bardeleben, a delivery of the notes, or offered to pay to either of them the $380,000, for them.

McComb was examined as a witness and makes no claim to the ownership of the notes, yet, he claims that, on the basis of borrowing money at the rate of six per cent. with which to purchase the notes, the transaction was worth to him $100,000 besides an interest he would have acquired in the Pratt Coal and Coke Company. (Record p. 18.)

16. The testimony of McComb shows that *at the time he and Adams separated on the 27th March*, 1883, he had not purchased the notes.

He had asked Adams to telegraph to De Bardeleben his offer of $350,000 for the notes, and awaited an answer before he would conclude an agreement with Adams. He states that "*before parting, witness told Adams that if this offer was declined, he would take the notes on the terms offered.*"

This was only an ambulatory promise to take the notes, and not a sale of them. He added "that in either case he (witness) was the purchaser of the notes."

Discarding, if we can, the covin in this dishonest effort to fleece De Bardeleben, the transaction was still executory and depended on the success of the deception practiced on a man who needed money very much.

If De Bardeleben had accepted the offer of $350,000 under these circumstances, and had delivered the notes, he could have recovered the $30,000 from McComb, but for the fact that this was the only offer *McComb had made to him* and, in order to hear from that, he had not advised De Bardeleben of his acceptance of the offer made by Adams, or that he would accept it. He and Adams fraudulently concealed from De Bardeleben the fact that in either

case McComb would consider himself the purchaser of the notes.

17. If this agreement was to be executed in Alabama, it was void, without the express assent of Wadsworth, if, as trustee, he could give his assent to the sale of these choses in action. The notes and the mortgage to secure them, were in the possession and ownership of Wadsworth, he holding them adversely to every body. It could not be executed elsewhere, than in Alabama, unless Wadsworth had consented to deliver the notes to McComb elsewhere.

Dishler *vs.* Dodge, 16 How. 622.

Elliott *vs.* McClelland, 17 Ala. 206.

Byrd *vs.* Oden, 9 Ala. 755.

Wheeler *vs.* Pounds, 24 Ala. 472.

These notes and the mortgage given to secure them are choses in action.

Sheldon *vs.* Sill, 8 How. 441.

18. The estate of Frank L. Wadsworth is made liable, by this judgment, for an alleged breach of an agreement made by him as trustee for Mrs. De Bardeleben and her children.

The character of trustee, in which he is alleged to have acted, was well known to all the parties.

He is sued on the alleged agreement as one that he had the right to make as trustee, and not for a tort in making an agreement that he had no right to make, as trustee.

If he made such an agreement, lawfully, he bound the trust estate and not himself.

Such an obligation, not being personal, can only be enforced in equity.

The administrator of Frank L. Wadsworth raised this question in the stipulation, under which he was made a party defendant, and the court decided it erroneously, in the second charge given to the jury, viz.: "that the present

suit was property brought against said Frank Wadsworth as an individual and that it was not necessary to sue him as trustee."

The general issue pleaded by the administration in behalf of his intestate in plea one, and also for himself in the third plea, raises this question also, and entitled the defendant to the general charge to the jury that "if the jury believe all the evidence, their verdict should be rendered for the defendant."

19. De Bardeleben had no right to sell these notes and no power to deliver them, and he could not confer that power on Adams. If Adams sold the notes for De Bardeleben to McComb, and if De Bardeleben was not excused from the obligations of that agreement, his ratification of Adams' conduct could not validate the sale, so as to bind Wadsworth or the trust estate.

Marsh *vs.* Fulton County, 10 Wallace 676.

JOHN T. MORGAN.

Attorney for Plaintiff in Error.

AGREEMENT OF COUNSEL TO AMEND THE RECORD, FILED WITH THE CLERK.

WILLIAM D. WADSWORTH,
AS ADMINISTRATOR OF THE ESTATE OF
FRANK L. WADSWORTH, deceased.
PLAINTIFF IN ERROR,
vs.
THEODORE ADAMS.

In error to the Circuit Court of the United States for the Northern District of Alabama.

It is hereby agreed that the following minute entry of the court in this case found on page 10 of the printed record, viz.: "come the parties of their attorneys and the defendant now interposes his demurrer to the defendant's plea numbered two; whereupon after due consideration, it is by the court ordered that said demurrer be and the same is hereby overruled," be corrected so as to read as follows, viz.: "come the parties by their attorneys and the plaintiff now interposes his demurrer to the defendant's plea numbered two: whereupon, after due consideration, it is by the court ordered that the demurrer be, and the same is hereby overruled.

~~HEWITT WALKER & PORTER,~~
~~Attorneys for plaintiff in error.~~
~~SMITH & BRADFORD,~~
~~Attorneys for Appellee.~~

Signed,
John T. Morgan
Attorney for plaintiff in error
Mayer M Haugh
Attorney for defendant in error

No. 152. October Term, 1830.

In the Supreme Court of the United States.

William D. Wadsworth, Administrator,

vs.

Theodore Adams.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF OF DEFENDANT IN ERROR.

DAVID D. SMITH,
WAYNE McVEAGH,
For Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

William D. Wadsworth, Administrator,	October Term, 1890.
vs.	No. 152.
Theodore Adams.	

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF OF DEFENDANT IN ERROR.

COUNTER-STATEMENT.

The facts of the case are very simple. The defendant in the court below, it was claimed by the plaintiff, who is here as the defendant in error, contracted with the plaintiff to pay him $10,000 for effecting the sale, at eight per cent. discount, of five promissory notes of $100,000 each, made by the Pratt Coal and Coke Company, and owned by the defendant. The plaintiff proceeded to New York from Alabama, where the contract was made, and negotiated the sale to J. J. McComb, at the price agreed upon, and communicated the fact to the defendant before the agency for sale was revoked. The defendant, however, had sold the notes to another party in the meanwhile, making it impossible for him to carry out his contract to sell to McComb. It was in evidence (Record, pages 17, 18) and was undisputed that McComb was a responsible party, and was able and willing to fulfil his undertaking. The present suit was then brought to recover the commission agreed upon

for effecting the sale. The jury, upon the facts as developed, readily found a verdict for the plaintiff for the amount of his claim.

The points of law involved are few, as the questions were chiefly of fact, which the jury decided in favor of the plaintiff.

ARGUMENT.

It will be convenient to present the case in the order stated by the plaintiff in his assignments of error.

First Assignment.

That the Circuit Court erred in rendering judgment against William D. Wadsworth as the administrator of Frank L. Wadsworth, to be levied of the property of the decedent's estate, he having been only a naked trustee of the property of the wife and children of De Bardeleben, for the benefit of whose trust estate the record shows he was acting.

Answer.—William D. Wadsworth was the legal owner of the notes. (Record, pages 18 and 19.) It was in evidence (page 13) that the agreement between Adams and De Bardeleben, the agent of Wadsworth, was to be carried out by Wadsworth. In fact, the sale of the notes was specifically stated by De Bardeleben as being made by Wadsworth (page 17, folio 32); and this, Wadsworth, himself, admits in his letter to Adams of March 27th, 1883 (page 16, folio 30).

The suit and the judgment were personal against Wadsworth, and not against the trust estate, because it is well settled that if bound at all he was bound personally, and not as trustee.

Taylor vs. *Davis*, 110 U. S., 330, 336, 337;
Duvall vs. *Craig*, 2 Wheat., 45.

The contention of the plaintiff in error at page 24 of his argument, that the trust estate, and not the personal estate of the trustee is bound, is fully answered by this court speaking by Justice Woods in *Taylor* vs. *Davis*, 110 U. S., at page 335, "When a trustee contracts as such, unless he is bound, no

one is bound, for he has no principal. The trust estate cannot promise; this contract is therefore the personal undertaking of the trustee. *As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such.*"

See also *Jones* vs. *Dawson*, 19 Ala., 672.

The code of 1886 of Alabama, sections 3564 and 3565, provides for suits against trustees in their representative capacity in the cases designated. The present case not being of the class designated, Wadsworth was personally liable.

SECOND ASSIGNMENT.

That the Circuit Court erred in giving to the jury each of the several instructions set forth in the record and numbered respectively 2, 3, and 4, and in the charge that is not numbered, but was first given to the jury, as the same is set forth on pages 21 and 22 of the record.

Answer.—The charge numbered 2 (page 22) is amply sustained by the authorities cited under the preceding head, and the point involved is there fully considered.

The charge numbered 3, refusing a binding instruction for the defendant needs no argument to sustain it. With the positive evidence of the contract and its fulfillment by Adams, with the evidence of De Bardeleben's agency for Wadsworth as shown by their acting together in securing the disposal of the note, there could be a binding instruction for the defendant only upon the theory that Wadsworth was not personally bound, or that the principal is not generally, and was not in this case, liable for the acts of his agent within the scope of his authority. And neither of these propositions is at all sustainable.

The charge numbered 4 was palpably correct under the evidence, if the court was justified in stating as a premise that the plaintiff was a special agent to sell the notes at a specified price. This may be examined in considering—

The charge not numbered, first given to the jury, wherein it was charged (1) That the plaintiff was a special agent;

(2) That if the jury believed the facts testified to by Adams and McComb, there was no breach of duty on the part of Adams as agent in failing to report the willingness of McComb to purchase at the authorized price if the lower price were declined—such as would require the forfeiture of his commission for sale.

1. *That the Plaintiff was a Special Agent.*

The objection is made at length by the plaintiff in error to the court charging as matter of law that on the facts developed the plaintiff was Wadsworth's special agent. No such charge was given. The court charged at page 21 that Adams was a *special* agent as distinguished from a *general* agent, without specifically charging that he was the special agent of anybody. The theory of the plaintiff's case was that Adams was an agent for sale employed by De Bardeleben who was himself a general agent of Wadsworth with full power over the subject-matter. The legal basis for the recovery of the commission from Wadsworth was that as principal he was liable for the act of De Bardeleben within the scope of his authority.

"An agent is authorized to employ means suitable and usual to execute his mandate. Hence a principal is liable for the rent of a place of business occupied by his agent while carrying on the business for which he was employed."

Wharton on *Agents and Agency*, section 126.

It was undisputed that De Bardeleben employed Adams to sell the notes, and it is very clear this act of employment was within the scope of his own agency, for it was a necessary means of rendering his agency effective.

Williams vs. *Getty*, 31 Pa. St., 461.

The plaintiff in error is therefore wide of the mark in endeavoring at length to establish from the evidence that there was nothing to show that Adams was Wadsworth's special agent. All that is necessarily in the case in this connection is that Adams was a subagent lawfully employed by De Bardeleben. Wadsworth was then liable to carry out with Adams what De Bardeleben stipulated. Now there was no dispute whatever

that *Adams* was *an* agent. All that the court charged as to his agency was that upon the undisputed facts he was a *special* agent. This was a question of law, and could not without error have been left to the jury to decide. The authorities cited at page 5 of the brief of the plaintiff in error merely state the familiar law that *where there is a dispute as to the fact of agency*, the question of agency or not must be left to the jury. They do not touch the principle that it is the duty of the court, as exercised in this case, to declare the legal effect of an admitted relationship between the parties.

The court was certainly right in declaring as matter of law that Adams' agency or employment was special. The agency was to sell the notes at eight per cent. discount per annum. His employment for that purpose was the very central fact in the case. If the court were powerless to state to the jury in legal phrase the nature of the employment, it would be helpless before the jury and would be declining to exercise its necessary function. A verdict based upon a finding by the jury that Adams was a general agent would have been properly set aside, because there was no evidence to support it. And a verdict based upon failure of the jury to recognize that Adams' admitted authority was special, must likewise have been avoided. That being so, the court was only doing its duty in charging in the first instance what must have been said to the jury sooner or later.

2. *That if the facts in evidence were believed there was no fraud or breach of duty on the part of Adams in failing to report the willingness of McComb to buy at the authorized price, if the lower price of $350,000 were declined.*

The whole argument of the plaintiff in error in assailing this feature of the charge is postulated upon the theory that Adams was a general agent, with authority to get the best price possible, and that any communication to the vendor of a lower price than the best was a fraud.

So far is this theory without basis, that Adams was in fact, the price having been fixed by the vendor, practically merely a middleman to bring the parties together at that price, a commission accruing to him in the event of sale. The

general rule is that an agent whose duty it is to bring the parties together may act for both parties without their knowledge or consent.

Rapp vs. *Sampson*, 16 Gray, 398;
Collins vs. *Fowler*, 8 Mo. App., 588;
Orton vs. *Scofield*, 61 Wis., 382.

Adams' acquiescence in McComb's request to communicate his offer of $350,000 was therefore quite compatible with his duty to De Bardeleben. It could not be pretended that with his special agency to sell for $380,000 it would have worked a forfeiture of commissions for him to fail to communicate the fact, if it had been the fact, that he could have gotten more than that sum. Even with knowledge of such a fact he could have sold at $380,000 and obtained his commission. Why should his communication of a lower offer prejudice him, especially when the offer at the stipulated price, $380,000, was only conditional upon the first offer being refused?

Moreover, the evidence shows that no injury resulted to De Bardeleben or Wadsworth from Adams' communication of the lower offer. Both Adams and De Bardeleben agreed (p. 14, fol. 27; p. 20, fol. 37) that Adams sold the notes at $380,000, and so notified De Bardeleben before De Bardeleben's dispatch of the 29th of March, 1883, announcing his sale of the notes to another person, or any other revocation or attempt at revocation of Adams' authority. The most that can be said for the plaintiff in error is that Adams' conduct *might have* resulted in giving him an opportunity to defraud his principal—if the notes had been sold to McComb for $350,000, when they could have been sold at $380,000. A neglect of duty which merely might have resulted injuriously to the principal, but which, in fact, resulted in an exact, literal, full and complete discharge of all his duties, could not possibly be a fraud.

It must be observed that Adams is not claiming a commission on a sale at $350,000. Had the sale been at that figure he could not under his contract claim any commission. And

this is a conclusive argument to show his good faith in endeavoring to sell for $380,000.

But supposing, for argument's sake, there had been a breach of duty on the part of Adams. He would not thereby forfeit his commissions, but would merely have been liable to pay such damages as resulted from his breach; and inasmuch as no damages resulted, he would be entitled to the full commissions agreed to be paid.

In the following cases agents had authority to sell for a fixed price. They sold for sums in excess of the fixed price and retained the difference, together with the agent's commissions. It was held that the principal was bound to the agent only for the commission, and that the latter was entitled to the commission:—

Kilbourn vs. *Sunderland*, 130 U. S., 505;
Blanchard vs. *Jones*, 101 Ind., 542;
Kerfoot vs. *Hyman*, 52 Ill., 512;
Merryman vs. *David*, 31 Ill., 404.

When the agent defrauds his principal, the principal can recover only the damages sustained.

McMillan vs. *Arthur*, 98 N. Y., 167.

The whole argument of the plaintiff in error based upon the alleged fraud of Adams is theoretical. No evidence whatever was offered by the defendant tending to sustain the allegation of fraud. The testimony recited by the judge at page 21 was the whole evidence on the point. It was, therefore, obviously proper for the court to charge that if the jury believed the facts indicated by it, the defense on the ground of fraud was not made out, the law being as above stated as to the duty of Adams in the premises.

THIRD ASSIGNMENT.

That the Circuit Court erred in refusing to give the charge numbered 1 which the defendant in said cause, in writing, requested the court to give to the jury.

The point submitted for charge was that if the jury believed

that the promise to pay $10,000 was made by De Bardeleben for himself and not for Wadsworth as trustee or as an individual, and if the promise was never made by Wadsworth, the verdict should be for the defendant.

Answer.—This point for charge leaves altogether out of consideration the question of ratification by Wadsworth. The evidence that Wadsworth ratified the contracts made by De Bardeleben was ample. After the arrangement was made with Adams Wadsworth obtained the opinion of W. H. Smith as to *his own* authority to sell the notes, and sent it in a letter to Adams declaring himself as the seller, and directing Adams for further information to "advise Mr. De Bardeleben or myself." (Page 16, folios 30 and 31.) This was a distinct recognition by Wadsworth of Adams' relation to the transaction as agent for sale, and of De Bardeleben's engagement with him, including its necessary incident—the commission of Adams. The court was asked in the above point to ignore this evidence of ratification and to instruct the jury to find a verdict for the defendant if they believed that the engagement was originally made by De Bardeleben. Of course this could not be done, and the point was refused. It may be observed that there was nothing whatever in evidence to show that De Bardeleben, when stipulating for Adams' commission, stated that he, De Bardeleben, personally would pay it. Adams was practically given to understand that his terms were accepted, the implication being that the person legally bound to do so would carry them out. If, as De Bardeleben testified at the trial, he made the contract for himself personally, it was purely a mental conception, for he at no time indicated in any way to Adams that he was making it for himself. All this time he was holding Wadsworth out as the owner of the notes, and Wadsworth himself declared that he was the owner, and recognized De Bardeleben as authorized to arrange for their disposal.

The ratification of this authority to sell surely included within it the ratification of the costs of or commission for sale, especially as at no time was there any suggestion to Adams that he must look to De Bardeleben alone, or even at all, for his commission.

FOURTH ASSIGNMENT.

That the Circuit Court erred in its refusal to give to the jury defendant's point for charge numbered 2.

The point involved is practically the same as the last preceding. It assumes that Wadsworth was liable only in the event of an express promise by him being shown. Wadsworth was clearly bound if he contracted by his agent or ratified the contract of De Bardeleben. *Qui facit per alium facit per se.* There is nothing whatever in the statement that the complaint as filed rested solely upon an express personal promise by Wadsworth. It was in usual form and allowed of proof of the contract in any way effective to bind the defendant who either expressly or impliedly assented to its terms either before or after it was made.

The refusal of the court to direct a verdict for the defendant if all the evidence was believed, included in this assignment, has already been noticed.

FIFTH ASSIGNMENT.

That the said Circuit Court erred in permitting the plaintiff to answer the question put to him as a witness for himself, by his attorney, as follows: "Whether, while in Birmingham he made any agreement with H. F. De Bardeleben as the agent of Frank L. Wadsworth in relation to a sale of any notes of the Pratt Coal and Coke Company."

Answer.—This question was admitted provisionally upon the undertaking of the plaintiff to follow up this evidence by proof of the agency of De Bardeleben. This was in accordance with the rule declared in *Metropolis Bank* vs. *Guttschlick*, 14 Pet., 19. The subsequent proof of De Bardeleben's agency was established by the letter of March 27th, 1883, Wadsworth to Adams (page 16).

"So far as concerns third parties the test is acquiescence or recognition. Did A. acquiesce in B. acting as his agent? Did he recognize B. as such agent? If so, he is estopped from afterwards disputing his agency."

Wharton on Agency, section 125.

The sixth assignment of error need not be specially noticed, as it is merely a general assignment.

Under the rules, it is submitted, therefore, if the answers above stated are deemed conclusive, the judgment must be affirmed.

The series of propositions printed in the brief of the plaintiff in error as law points and points in argument may however be noticed briefly in so far as they have not already been disposed of above.

ANSWER TO BRIEF OF LAW POINTS OF PLAINTIFF IN ERROR.

Points 1, 2, 8, and 15 have already been considered.

Point 3.—That Wadsworth the trustee was the agent of De Bardeleben, and that there is no proof that Wadsworth made De Bardeleben his agent to sell the notes.

Answer.—The existence of De Bardeleben's agency is shown by the admission of Wadsworth in his letter of March 27th, 1883, that he was principal. "I hand you inclosed opinion of Governor Smith with reference to *my authority as trustee to dispose of the notes named*," and his directing Adams to De Bardeleben, "*Should you desire any further information, please advise Mr. De Bardeleben or myself*;" and by De Bardeleben's uncontradictive statements (page 17) "*that the sale of the notes would have to be by Wadsworth as such trustee.*"

Points 4, 5, 9, and 10.—That Wadsworth exceeded his powers in assuming to sell these notes.

Answer.—The question of the trustee's power is not in the case.

But it it were, the one conclusive answer would be that Wadsworth and De Bardeleben did in fact sell these specific notes to Enoch Ensley (page 21). Wadsworth's letter of the 27th of March also estops him from denying his power of sale.

Point 6.—That no agreement was concluded between McComb and Adams.

Answer.—The argument of plaintiff in error here is disingenuous. He attempts to show by verbal emphasis from Adams' testimony that there was no conclusive sale of the notes to McComb. But he deliberately omits the specific evidence of McComb himself on the point (page 18, folios 33, 34), "afterwards and before parting, witness told Adams that if this offer (of $350,000) was declined, he would take the notes on the terms offered, namely, eight per cent. per annum discount, *and that in either case he (witness) was the purchaser of the notes.*"

Point 7.—That De Bardeleben promptly revoked Adams' agency.

Answer.—This revocation was not even attempted till March 29th, 1883, after the notes were sold by Adams. (Page 14, folio 27.)

Points 11 and 13.—That the contract of Adams with McComb violates the policy of the law.

Answer.—As before observed, there is nothing but assumption on the part of the plaintiff in error that Adams attempted to cheat De Bardeleben or Wadsworth. The evidence on the point is all the other way. The communication by Adams of the offer of $350,000 was made very reluctantly and under protest; and there is nothing whatever to show that Adams was in any way interested in it. On the contrary his interest was for the acceptance of the offer of $380,000, for he would have been entitled to no commissions upon a sale at the lower figure.

The cases cited at page 9 of brief of plaintiff in error to establish bad faith on the part of Adams, in so far as they have any relevance whatever, are cases of general agency to get the best price. Adams' special agency to sell at $380,000 relieves him from the obligations belonging in the other agency.

Points 14 and 16.—That the jurisdiction is in equity and not of law.

Answer.—The action was upon the contract for commissions against Wadsworth personally. The trust estate was in no sense bound, as has been seen. The contract being established, the remedy at law was plain, adequate, and complete, and a bill in equity would have been demurrable.

Point 17.—That the evidence of transactions with De Bardeleben, agent, was incompetent after the principal's death to bind his estate.

Answer.—No conversation with Wadsworth was testified to. De Bardeleben, with whom the transactions were had, was alive to contradict and cross-examine Adams and actually was called to testify. The objection on this point is trivial.

The only point that perhaps remains to be noticed is that numbered 17, at page 24, that if the contract was to be executed in Alabama it was void without the express assent of Wadsworth.

There is nothing whatever to show that it was intended to be executed in Alabama. The presumption indeed is that the execution of it was to be in New York rather than Alabama. Adams said to De Bardeleben that he thought J. J. McComb, of New York, would take the notes (page 12), and De Bardeleben persuaded Adams to relinquish his trip in the South and go to New York to sell the notes (page 13). Wadsworth's letter of the 27th of March, 1883, was directed to Adams at Philadelphia, recognizing him as already in the North for the disposal of the notes and the closing of the contract.

But it really matters not even if the contract was intended to be executed in Alabama. Wadsworth expressly recognized and assented to De Bardeleben acting for him in arranging and disposing of the notes.

He was bound personally for the act of his general agent within the scope of his authority, viz., for the engagement of De Bardeleben to Adams for a fair commission of $10,000 for effecting the sale.

It will not escape the observation of the court how many novel questions the present learned counsel for the plaintiff in error has raised and imported into this case. Comparatively few of them were raised below, and their chief value here, perhaps, is in their tendency to obscure the real and simple issue in the case, whether Wadsworth, who owned certain notes, was liable to fulfil his general agent's undertaking for his principal for the payment of a commission for sale of the notes. On the merits there was no denial of the contract or of its terms. And it is not believed this court will countenance the technical, and, if it may be said, trivial objections now raised for the first time by the plaintiff in error, especially where the facts in dispute were passed upon fairly by a jury after a full and intelligent charge by the court.

DAVID D. SMITH,
WAYNE MacVEAGH,
For Defendant in Error.

Plaintiffs Ex A

157

Plat of Part of the Common Field of Prairie du Pont.
Town 1 N R 10 W of 3d Pr. Meridian.

8.30 S 41° 20' E. var 23' W 261.07 chains 152.34

1305 S 41° 20 E var 23 W 265.55 chains 112.56 149.00

16.50 S 41° 20' W var 23° W 280.78 chains.

16.80

Survey № 143
" " 144
" " 145
" " 146
" " 147
" " 148
" " 149
" " 150
" " 151
" " 152
" " 153
" " 154
" " 155
" " 156
" " 157
" " 158
Survey № 159

5 Qst.

Survey № 160
" " 161
" " 162
" " 163
" " 164
" " 165
" " 166
" " 167
" " 168
" " 169
" " 170
" " 171
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" " 174
" " 175
" " 176
" " 177
" " 178
" " 179
" " 180
" " 181
" " 182
" " 183
" " 184

Lake.

Lake.

Falling Spring.

Stone Stone Stone

1- PLAINTIFF'S EXHIBIT "A"

No. 1535. Seeger et al. Rutz } p. 154

Scale of 15 chains to one inch. run A the Magnetic Meridian. course of Witness trees taken at the same. W L Deneen

November 15 A D 1850 in the employ of Augustus A Bloomfield I marked the corners of 20 tracts in wooded bottom on the Mississippi River and running to the bluff bet. T 1 N R 10 W of 3d Pr. Meridian and being Surveys number from 149 to 156 inclusive.

Recorded July 31st 1854.

State of Illinois } ss.
County of St Clair }

Seal.

I, DJ Caputy Recorder of Deeds in and for said County of St Clair and State of Illinois do certify the foregoing to be a true and correct Plat of Plat part of Congressional Fields and Prairie du Pont T 1 N R 10 W as the same appears of record in Book "F" on page 343 & 344 of said Deed Records. In testimony whereof I have hereunto set my hand and affixed the seal of said office in Belleville Ills. this 24 day of November A D 1886.

DJ Caputy Recorder
by Fred Jaeger Dpty.

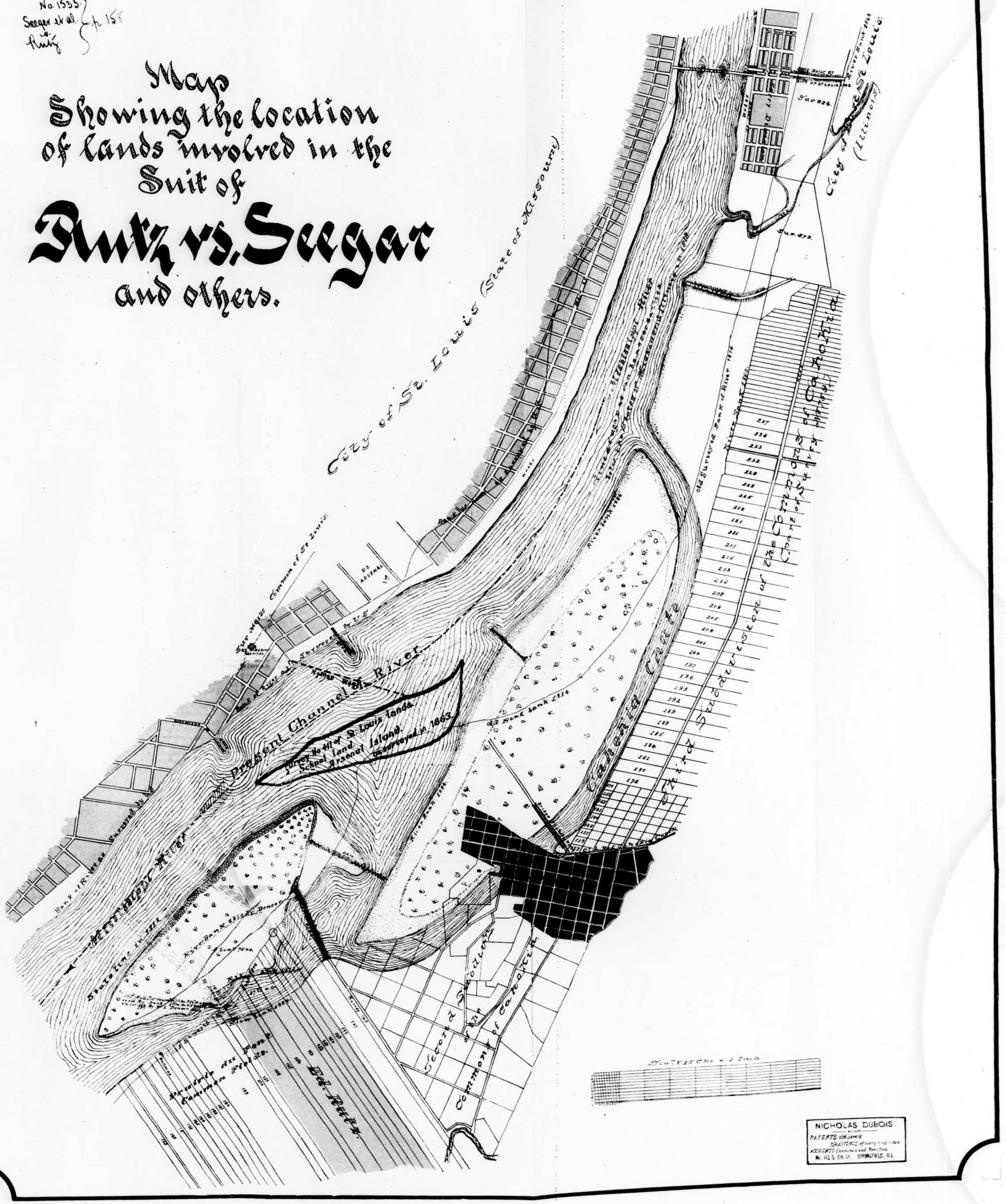
NICHOLAS DuBOIS,
PATENTS obtained.
DRAWINGS of every kind made.
ACCOUNTS Examined and Rectified.
No. 112 S. 6th ST., SPRINGFIELD, ILL.

i- Plaintiffs Exhibit B.

No. 1535
Seeger et al.
vs.
Pauly
} Ex. 158

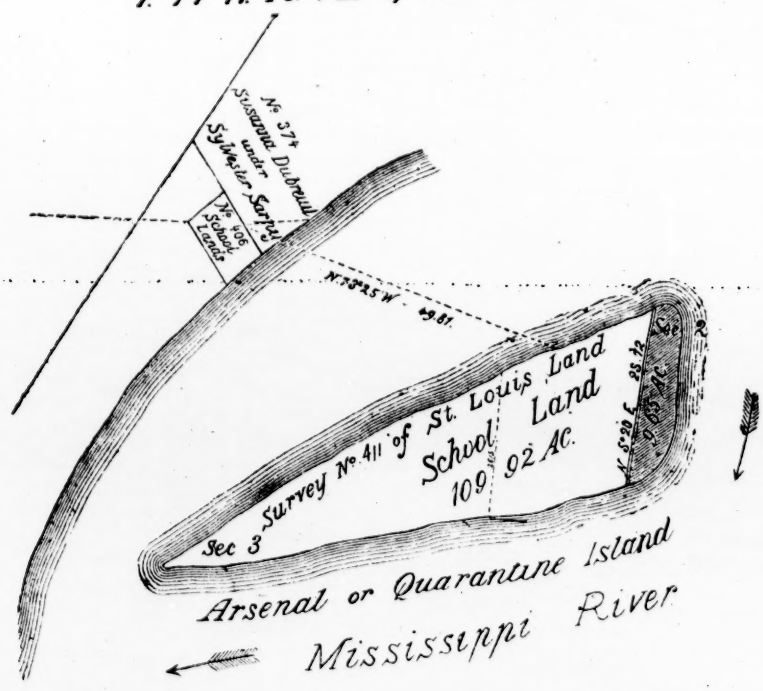
Map Showing the location of Lands involved in the Suit of

Pauly vs. Seeger and others.


City of St. Louis (State of Missouri)
City of St. Louis (Illinois)
Mississippi River
Present Channel of River
Survey No 111 of St Louis Lands.
School Land
Arsenal Island
as surveyed in 1863.
Old Bank Bank 1814
River Bank 1814
Old Surveyed Bank of River 1814
Bank of River as Surveyed by U.S.
Bank of River as Surveyed by U.S.
River Bank 1850
Old Bank of River 1814
Old Bank of River 1814
Old Bank of River 1814

K.
Maps of Islands
by Cozzens 1863

T. 44 N. R. 7 E. of the 5th P. Mdn.



No. 1535.
Sequestral
vs
Ruiz
} p. 160.